TRAINING BULLETIN: SUMMER, 2002
VOLUME 12, NUMBER 2
COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
44 BROMFIELD STREET, BOSTON, MA 02108

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I. INDIGENT DEFENSE NEWS

REQUIRED TRAINING FOR ALL CPCS DISTRICT COURT AND JUVENILE DELINQUENCY CERTIFIED ATTORNEYS

CPCS will present a one-day required training program (offered several times across the state free of charge) concentrating on the legal and procedural issues relating to the Sex Offender Registration and Notification Act. This training is required for all CPCS District Court and Juvenile Delinquency certified attorneys in order to maintain certification. Attorneys who complete this training will be certified to receive appointments in Sex Offender Registry Board cases which are paid at a rate of $39/hour. Attorneys who attended the SORB/SDP two-day training program offered earlier this year are not required to attend this one-day program.

Trainings are scheduled for the following dates:
Thursday, October 24, 2002 Springfield
Thursday, November 7, 2002 Peabody
Thursday, November 14, 2002 Taunton
Thursday, December 5, 2002 Boston
Thursday, January 9, 2003 Boston
All programs run from 8:45 a.m. to 5:00 p.m.

Please notify the C.P.C.S. Training Unit as soon as possible of your choice among the five scheduled programs so that adequate seating can be arranged. Please provide this notice **by e-mail if at all possible to**:
Kristen Munichiello, C.P.C.S. Training Unit
e-mail: kmunichiello@publiccounsel.net
voice mail: (617) 988-8323
US mail: CPCS, Training Unit
44 Bromfield Street
Boston, MA 02108

REQUIRED TRAINING FOR ALL SUPERIOR COURT AND YOUTHFUL OFFENDER CERTIFIED ATTORNEYS – FINAL PROGRAM

In September, 2001 CPCS announced that all Superior Court and Youthful Offender Certified Attorneys would be required to attend a two-day training program on Sex Offender Registration and Notification & Sexually Dangerous Person Commitment Hearings in order to maintain their certification. These Training Programs were offered in February and March of 2002 throughout the state. CPCS Superior Court and Youthful Offender certified attorneys who were unable to attend any of those scheduled programs and attorneys who gained Superior Court and/or Youthful Offender Certification after March, 2002 are required to attend the final program scheduled for December 16 & 17, 2002 from 9:00 a.m. to 5:00 p.m. at MCLE in Boston. To register for this program please contact Kristen Munichiello, CPCS Training Unit, 44 Bromfield Street, Boston, MA 02108, (617) 988-8323, e-mail: kmunichiello@publiccounsel.net

NOTICE TO ALL APPELLATE ATTORNEYS

Do you ever wonder what your peers are up to?

A group of 14 appellate panel members gathered for lunch in Boston in June to socialize, network, and share work ideas and concerns. It was a great success, and everyone agreed that it should be repeated.

We also heard from a number of attorneys who would prefer to get together outside Boston or after work. **We plan to schedule a similar event in the fall, after work at a location easily accessible to Rte. 128.**

Send an e-mail to **Attorney Bonny Gilbert at ygilbert@tiac.net** if you would like to be notified of this event. Please let her know if you have any suggestions for a location, what your preference is for time, and whether you would like it to be for cocktails or dinner.

JUVENILE DELINQUENCY/ YOUTHFUL OFFENDER REGIONAL COORDINATORS

CPCS seeks applications for four part-time (approximately five hours per week) contract positions of Juvenile Delinquency/Youthful Offender Regional Coordinators to begin October 1, 2002 through September 30, 2003. One Regional Coordinator is needed in each of the following four locations: Hampden County, Suffolk County, Worcester County and Lowell, to serve clients and attorneys in the juvenile courts. Responsibilities include providing advice and technical assistance to Juvenile Delinquency and Youthful Offender certified attorneys, conducting training programs, and acting as a liaison to the courts. Applicants should possess the following minimum qualifications: membership in the Massachusetts bar, current Youthful Offender certification; a minimum of five years experience practicing law, including three years experience representing juveniles in delinquency and youthful offender cases; extensive trial experience; excellent research and writing skills; ability to maintain good relationships with judicial and legal personnel. Contracts are dependent on the state budget. To apply, please send a statement of interest, a current resume, a recent writing sample, and names, addresses and telephone numbers of two references no later than August 9, 2002 to: Helen Fremont, Staff Counsel, Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA 02108.

REQUEST FOR PROPOSALS FOR PROVISION OF LEGAL SERVICES TO INDIGENTS IN DUKES COUNTY

The Committee for Public Counsel Services is accepting proposals from attorneys who wish to organize, coordinate and provide legal services in the Edgartown District Court from October 1, 2002 - September 30, 2003.

Attorney coverage is needed in the Edgartown District Court every day throughout the year; provision for conflict counsel and on-call counsel is also required. Attorney coverage is also needed for two juvenile dates per month on Martha's Vineyard, and approximately thirteen weeks of jury sessions per year. Statistics regarding the number of assignments in the Edgartown District Court for prior fiscal years are being prepared and will be available by mail or FAX upon request.

We would like to decide on a delivery system and have it begin operating October 1, 2002 through September 30, 2003. Any attorney interested in coordinating and providing services must send a written proposal **on or before August 30, 2002** to: **Helen Fremont, Staff Counsel, 44 Bromfield Street, Boston, MA 02108**

For a copy of the guidelines for submission of a written proposal, please call Betty Ann Linfield at (617) 988-8332. AA/EOE

REQUEST FOR PROPOSALS FOR PROVISION OF LEGAL SERVICES TO INDIGENTS IN NANTUCKET COUNTY

The Committee for Public Counsel Services is accepting proposals from attorneys who wish to organize, coordinate and provide legal services in the Nantucket District Court from October 1, 2002 - September 30, 2003.

Attorney coverage is needed in the Nantucket District Court every day throughout the year; provision for conflict counsel and on-call counsel is also required. The Nantucket Court sits one day per week in the winter, spring and fall and two days per week in the summer. On-call coverage must be provided for the other days. Attorney coverage is also needed for one juvenile date per month on Nantucket, and jury sessions three days a week every other month. Statistics regarding the number of assignments in the Nantucket District Court for prior fiscal years are being prepared and will be available by mail or FAX upon request.

We would like to decide on a delivery system and have it begin operating October 1, 2002 through September 30, 2003. Any attorney interested in coordinating and providing services must send a written proposal **on or before August 30, 2002** to: **Helen Fremont, Staff Counsel, 44 Bromfield Street, Boston, MA 02108**

For a copy of the guidelines for submission of a written proposal, please call Betty Ann Linfield at (617) 988-8332. AA/EOE

WITH GRATITUDE FOR OUTSTANDING SERVICE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES PROUDLY ANNOUNCES ITS 2002 AWARDS RECIPIENTS

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.

RANDOLPH GIOIA, ESQ.
Randy Gioia is a trial attorney concentrating in the area of criminal defense litigation. He is a graduate of Columbia College and Boston University School of Law. He has been the chair of the Suffolk County Bar Advocate Steering Committee and co chair of the Boston Bar Association's Criminal Law Section. He is a member of the Committee for Public Counsel Services Advisory Committee, which recommends certification of attorneys for murder and superior court appointments. He is also the co chair of Suffolk Lawyers for Justice, Inc., a nonprofit corporation responsible for the administration of the delivery of legal services to indigent people charged with crimes in Suffolk County. He is a Contributing Author of: "Trying Sex Offenses in Massachusetts," MCLE, 1998; and "Crime and Consequences," MCLE, 2001. He defends the accused in both state and federal court.

BENJAMIN KEEHN, ESQ.
Benjamin H. Keehn is a 1983 graduate of Northeastern University School of Law. After a clerkship with the Massachusetts Appeals Court and a two-year stint in the public defender's office in West Palm Beach, Florida, he was hired by CPCS to work in the Public Defender Division in 1987. Ben Keehn worked in the trial unit in the Roxbury and Boston offices, before moving to the Appeals Unit in 1990. As an appellate defender, he has been counsel of record in dozens of cases decided by the SJC and the Appeals Court, including *Commonwealth v. Jones* (1996), which established that pretrial identifications that are not the product of state action may still be suppressed, and, most recently, *Commonwealth v. White* (2002), which established the relevance of an inmate's good behavior while incarcerated awaiting re-sentencing. In 1997, in the case of *Landry v. Attorney General,* Ben Keehn and John Reinstein of the Massachusetts Civil Liberties Union, challenged the constitutionality of the DNA data bank statute on behalf of seven prisoners, probationers, and parolees. After he and John Reinstein obtained a wonderful decision from Judge Isaac Borenstein in August of 1998, enjoining enforcement of the statute on the grounds that it violated the plaintiffs' right to be free from unreasonable search and seizure, the SJC reversed Judge Borenstein and upheld the statute. In 2002, Ben Keehn became CPCS's first Appellate Counsel to the Trial Unit. In that capacity, he has worked as co-counsel with public defenders in the Trial Unit developing and preserving issues in cases likely to wind up on appeal.

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

SAM SILVERMAN, ESQ.
Sam Silverman came to the law late in his professional life. He attended the City College of the City University of New York, and earned his Bachelors degree in Chemical Engineering. He was a physicist who taught at Boston College and later went to Suffolk University Law School. He was admitted to the Bar in 1982. After his retirement from Boston College, he began the practice of law. Sam represents criminal defendants on appeals. It was Sam's superb and relentless work on behalf of an innocent person, Angel Hernandez, who was wrongly convicted of rape in 1988 that ultimately lead to his exoneration and release. Though he is retired from Boston College, he still continues his research as a physicist and is considered one of the Country's leading authorities on the aurora borealis (the Northern Lights).

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman

was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

"SECOND THOUGHTS" PROGRAM

The Second Thoughts Program at MCI Norfolk is directed by Thomas Koonce. The program is comprised of a group of inmates at MCI-Norfolk, who have developed a program focused on educating juveniles who have been committed to the Department of Youth Services and are completing their treatment. In the past several years, Second Thoughts has counseled hundreds of youths from various juvenile facilities affiliated with DYS. The program's emphasis is on confidentiality and non-confrontation; it is not a "scared straight" type of program. Inmates are permitted to become members only after they have survived a rigorous formal application process that is administered by other members. The program members receive no prison credit for their service. Their goal is to counsel at-risk young people to divert them from further criminal involvement, while encouraging them to make responsible choices. They are effective because they are dedicated and credible.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

MICHAEL FARRINGTON, ESQ.

Michael Farrington is a graduate of Suffolk University Law School, Boston (LL.B., 1967) and Boston College, Newton (B.A., 1962). Attorney Farrington was a trial attorney with the former Massachusetts Defender's Committee from 1968 to 1972. He was the first director of the Suffolk County Bail Appeal Project at the Charles Street Jail; first supervisor of bail officials for the chief justice of the Superior Court; assistant attorney general; and assistant secretary of public safety (Edward J. King administration) 1972 to 1983. He has a private practice with offices in Boston and Quincy, with emphasis on criminal defense, general civil litigation, administrative law, and recently representing respondents opposing SDP petitions. He shared his hard won insights into how to defend clients facing "civil" commitment of a day to life by providing excellent materials and speaking at the statewide Committee for Public Counsel Services training program "Defending the Accused: Sexually Dangerous Person Commitment Proceedings".

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

DOROTHY MEYER STORROW, ESQ.

Dorothy Meyer Storrow runs her own private practice, representing children and parents in the probate, juvenile, and appellate courts. She has been the Franklin-Berkshire Counties Regional Coordinator of the Committee for Public Counsel's Children and Family Law Program since 1995. As Regional Coordinator, she provides advice and technical assistance to attorneys in child abuse and neglect cases and termination of parental rights proceedings, and serves as liaison between the bar and the courts and the community. She also works as a CAFL appellate and trial panel mentor, providing mentor services for newly certified CAFL trial and appellate attorneys. She shares her knowledge and insight by teaching at training programs for CPCS, Massachusetts Continuing Legal Education, and at the biannual Children's Justice Task Force Conference. She fights every day, for every client, on every case with skill, compassion, and generosity of spirit.

The 2002 CPCS Annual Training Conference was a great success. The Training Unit would like to send a special thank you to the following people who volunteered their time to speak at the Conference: Annabelle Hall, Esq., Carol Donovan, Esq., Joseph Plaud, PhD, Greg Gonzalez, Esq., Bruce Carroll, Esq., Antonia Soares, Esq., Lisa Steele, Esq., John Roemer, Esq., Eduardo Masferrer, Esq., Susan Dillard, Esq., Kathleen McCaffrey, Esq., Ann Crowley, Esq., Mary LeBeau, LICSW, Cathy Brings, LICSW, Mark Shea, Esq., Larry Lopez, Colleen Tynan, Esq., Stuart Hurowitz, Esq., Ben Keehn, Esq., Carol Gray, Esq., Dan Callahan, Esq., Patricia Garin, Esq., Josh Dohan, Esq., Barbara Kaban, Esq., Thomas

Grisso, PhD, Anne Goldbach, Esq., Harry Miles, Esq., Paul McManus, Esq., Wilson Dobson, PE, and Lucinda Brown. Also a special thank you goes out to support staff who helped out with registration: Debbie Dellasanta (CPCS Worcester), Melissa Carter (CPCS Boston) and Tamika Jones (CPCS Boston)

2002 Conference Materials on CD-ROM

The materials from the 2002 conference are available on a CD-ROM in Adobe Acrobat format (you can download the Adobe Acrobat Reader from the CD-ROM). If you were unable to attend the 2002 CPCS Annual Training Conference and would like to receive the CD-ROM, please send your request in writing to: CPCS Training Unit, 44 Bromfield Street, Boston, MA 02108. CPCS requests a contribution of $25.00 to the CPCS Training Trust to help defer costs and aid in future training initiatives.

II. MESSAGE FROM THE CHIEF COUNSEL

Compensation. Innocence. Children. These are the three themes I addressed in my remarks to those who attended our annual training conference in Worcester on May 10.
These are the three urgent priorities which CPCS is determined to address successfully during the new fiscal year, and in the new legislative session which begins in January.

Compensation: It is a bitter irony that Massachusetts, which has been for seventy years a national trendsetter in enforcing the right to counsel, has dropped virtually to the bottom of the constitutional barrel in terms of attorney compensation. Our public defender starting salary of $33,000 is thousands of dollars below both the national average, and the lowest salary paid to any lawyer hired by the Commonwealth of Massachusetts. Our private counsel hourly rates of $30 and $39 are rivaled for penury only by New York and New Jersey. In the city of Boston at this moment, lawyers assigned to represent indigent clients in U.S. District Court are paid $90 per hour; while lawyers in the BMC or Dorchester District Court are paid one-third that amount.

These inadequate rates of compensation for the lawyers who represent poor clients, and thereby keep alive the Constitution for every citizen, are degrading; they are constitutionally indefensible; and their continuation is unacceptable. Over eight years ago, when the hourly rates were only marginally lower than today, CPCS authorized hourly rates of $50 and $65 ($85 for murder cases), subject only, as required by our statute, to appropriation. We have presented a variety of budget proposals to the Legislature and the Governor to achieve higher rates, but we have accomplished little.

We have decided to adopt an aggressive and multifaceted strategy: 1) The CPCS staff and Compensation Subcommittee this fall will produce, and the full Committee will consider, new authorized hourly rates and salary levels for inclusion in the annual budget submission to the newly elected Governor in December, and consideration by the Legislature in its 2003 session. We will not be proceeding alone. The Boston Bar Association has its own attorney compensation committee at work, and MACDL president Joe Balliro has made it his top priority to help achieve salary and rate increases for the attorneys who represent CPCS clients. The Massachusetts Bar Association, which has advocated for us vigorously in the past, can be counted upon to weigh in again. 2) We are watching closely the New York City litigation (New York County Lawyers' Association v. The State of New York, in which a state judge has issued a preliminary injunction ordering the payment of $90 an hour to assigned private counsel, pending trial or a political response to the constitutional imperative of higher hourly rates than the $25 out- of- court, $40 in- court level which is under challenge. That lawsuit, in which the plaintiff is represented pro bono by one of the City's most established law firms, followed the failure of the political process to address the "woefully inadequate" rates of compensation paid to the attorneys who represent the poor in criminal defense and Family court cases.
3) In an effort to increase public attention to this ongoing injustice, I have asked to meet with the editor or editorial board of every newspaper in the state; and I expect to speak with all of them during the next few months.

In the current fiscal crisis, we have fought hard and done well in the House and Senate budget debates to preserve the existing, inadequate hourly rates, and to avoid layoffs of underpaid staff attorneys. But Massachusetts should be ashamed to be degrading the right to counsel for indigent people – the right proclaimed by the Supreme Court in the Gideon case – by the meager compensation levels which it provides to those public-spirited attorneys who enforce that essential right. It is imperative that our salaries and hourly rates be brought into line with national norms. Nothing less is acceptable.

Innocence: A system of criminal justice which permits the conviction and incarceration of innocent people is a system in urgent need of serious reform. This is not just a national problem, and is not confined to death penalty cases. It is a serious, festering problem right here in Massachusetts, as a string of recently uncovered wrongful convictions has demonstrated. The convictions and state prison sentences of innocent persons Angel Hernandez, Donnell Johnson, Neil

Miller, Marvin Mitchell, Joe Salvati, Eric Sarsfield, and Kenneth Waters were presented at the April, 2002 conference Wrongful Convictions: A Call To Action at Harvard Law School. These cases and others demonstrate the need for legislation to reduce some of the major risk factors which have led to erroneous convictions of the innocent. Prominent among these risk factors are inadequate identification procedures, and the absence of a complete recording of all police questioning of suspects.

CPCS has heeded this Call for Action. Our Special Litigation Director, Carol Donovan and our criminal Training Director, Cathy Bennett are leading our effort, in concert with representatives from other organizations, to produce reforms which would correct the systemic flaws which contributed to these injustices. Carol and Cathy would like to hear from anyone who has an interest and a willingness to help. (cdonovan@publiccounsel.net, and cbennett@publiccounsel.net)

Children: Our representation of children – in Care and Protection, CHINS, Delinquency and Youthful Offender cases – is and has long been structurally deficient. Unlike our adult criminal defense representation, where clients in every region find support in a strong, mixed assignment system, with a relatively small public defender office and a larger number of assigned private counsel, our child clients and their assigned counsel in most regions lack the availability of any staff representation, advice or support. This must change. Children cannot continue to be second-class clients of this agency. Through our strong programs in Youth Advocacy, which has operated since 1992 in Roxbury; and in Children and Family Law, which has operated in Salem and Springfield since 1995, we have developed expertise and sophistication which should be available to children in every part of the Commonwealth.
Please share your reactions and suggestions with me, at wleahy@publiccounsel.net
Thank you.

III. CASENOTES

The following notes summarize opinions released by the Supreme Judicial Court and the Appeals Court in February, March and April, 2002. Always Shepardize! Applications for further appellate review may have been granted after the publication date of these notes. Furthermore, opinions may be "amended," sua sponte, or upon motion of a party. The Training Unit gratefully acknowledges James Hammerschmith, Esq. for writing the casenotes for this edition.

ADMISSIONS AND CONFESSIONS: MIRANDA WAIVER, DEMAND BY COUNSEL TO STOP INTERROGATION; HUMANE PRACTICE

Suspected in the rape, kidnapping, and murder of a five-year-old girl, the defendant was interviewed by a Revere police detective. Although the defendant was out on bail on an unrelated rape charge and had a lawyer in that case, he declined the detective's offer to let him call that lawyer for advice. He denied any involvement in the crime and, after a lengthy interview, left the station. In a second, tape-recorded interview with the same detective, he again denied any involvement in the crime. A few days later, he agreed to return to the station for an interview with a homicide detective. In the course of that interview, he agreed, among other things, to submit to a polygraph. Two days later, the homicide detective drove him to the state police barracks in Southborough for the polygraph. While he was there, his attorney in the unrelated rape case, having learned that the defendant was a suspect in the child's murder and believing him to be in police custody, contacted the detective bureau at the Revere police station and told them that he wanted all questioning stopped until he could be present to assist the defendant. This message was conveyed to a Suffolk County assistant district attorney, who telephoned counsel and told him that the defendant was taking the polygraph and did not wish to have counsel present. At about the same time, a colleague of counsel, who had received a CPCS appointment to represent the defendant in the murder investigation (since counsel himself was not on the "murder list"), telephoned the polygraph examiner. He told the examiner that he represented the defendant in the murder case and that he wanted the polygraph and all questioning of the defendant to stop. The examiner consulted with the assistant district attorney, who told him to continue with the polygraph. In spite of this instruction, the examiner told the defendant that the attorney had called and asked that the polygraph be stopped. The defendant said he wished to proceed with the polygraph. The polygraph results showed the defendant's answers to be deceptive. When the examiner told him this and encouraged him to tell the truth, the defendant confessed to having choked the victim. On appeal following his conviction, he argued that his motion to suppress this confession should have been allowed. *Commonwealth v. Vao Sok*, 435 Mass. 743 (2002). The Court holds that the motion was properly denied. The police had a duty, as delineated in *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000), to *immediately* inform the defendant of counsel's "efforts to render assistance." However, the defendant was free to decline counsel's assistance, as he did here. The "attorney's directive to the police to stop questioning the defendant require[d] only that they [do so] long enough to afford the defendant the opportunity to avail himself of the attorney's

advice," and, once he chose not to, they were free to ignore the attorney's request. 435 Mass. at 751-752. While the police erred in contacting the assistant district attorney, instead of immediately advising the defendant of counsel's attempts to assist him, this error was harmless because the defendant made no admissions in the interim between counsel's call to the police and the conveyance of his message to the defendant. *Id*. at 753. The Court finds it unnecessary to explore the prosecution's contention that CPCS can only legally appoint a lawyer for a defendant who requests counsel, because the duty of the police to tell a suspect of an attorney's attempts to help him does not turn on whether the attorney has been formally appointed to represent the suspect. *Id*. at 753-754. The Court also finds it unnecessary to decide whether, by instructing the police to proceed with the polygraph notwithstanding counsel's request to the contrary, the assistant district attorney violated Disciplinary Rule 7-104 (now Mass. R. Prof. C. 4.2), which prohibits a lawyer from "communicat[ing] or caus[ing] another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer . . . or is authorized by law to do so." Even if the prosecutor's actions were unethical, the Court is not convinced that "suppression is an appropriate remedy in this case for the alleged violation of an ethical rule" – particularly since the polygraph examiner ignored the assistant district attorney's instructions and told the defendant that his attorney wanted to stop the polygraph. *Id*. at 754. Finally, the Court upholds the trial judge's decision to exclude evidence of counsel's efforts to reach the defendant and stop the interrogation. Under *Mavredakis*, those efforts were relevant only to determining whether the defendant's *Miranda* waiver was knowing and intelligent. This determination is solely a matter of law for the judge. The humane practice rule only allows the jury to pass on the voluntariness of the statements, not than the validity of a *Miranda* waiver. 435 Mass. at 755-757. For more on the subject of an attorney's request that the police not speak with a client under arrest, see *Commonwealth v. Beland, 436 Mass. 273 (2002)* and associated practice tip at Admissions and Confessions: Prompt Arraignment Requirement; Failure of Appointed Counsel to Notify Police to Halt Questioning; Voluntariness, Mentally Ill Defendant, Late Night Interrogation.

ADMISSIONS AND CONFESSIONS: MIRANDA WARNINGS ADEQUACY, AMBIGUITIES AND INCONSISTENCIES WHEN MULTIPLE WARNINGS GIVEN

The native language of the defendant, under arrest for first degree murder, was Khmer. However, he was apparently also able to speak and understand English reasonably well. Prior to making incriminating statements to the police, he was given *Miranda* warnings in Khmer. These warnings were seriously deficient. They did not advise him of his right to remain silent, that anything he said could be used against him in court, or that a lawyer would be appointed if he could not afford one. Immediately after giving the warnings in Khmer, the same officer told the defendant that he was now going to repeat the warnings in English. He then gave the defendant complete and accurate warnings in English. The Supreme Judicial Court concludes that the defendant's motion to suppress the statements that followed should have been allowed. *Commonwealth v. Vuthy Seng*, 436 Mass. 537, 540-548 (2002). The operative rule announced by the Court is that "where two sets of warnings are given and one is defective or incomplete and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary." *Id*. at 547. Because the prosecution failed to meet its burden of proving a voluntary, knowing, and intelligent waiver, the defendant's conviction was reversed.

ADMISSIONS AND CONFESSIONS: MIRANDA WARNINGS, BURDEN OF PROOF AS TO CUSTODY

In *Commonwealth v. Alcala*, 54 Mass. App. Ct. 49, 52-55 (2002), discussed at Crimes: Drugs: Possession, Knowledge, Contents of Parcel Post Package, the trial judge conducted a voir dire hearing at defense counsel's request to determine the admissibility of statements the defendant made to the police. At the hearing, the trooper who obtained the statements said that he read the defendant his rights "from a *Miranda* card," but did not list the specific rights that he read. The written statement which the defendant eventually signed acknowledged that he received and understood his rights. The trial judge found that the *Miranda* rights were properly given and held the statements admissible. In doing so, he assumed that the defendant was in custody when the statements were made. On appeal, the defendant sought to challenge the judge's ruling that the warnings were sufficiently proven. The Appeals Court finds it unnecessary to resolve this question because, in its view, the defendant failed to meet his burden of establishing that he was in "custody" when the statements were made. "In the separate [voir dire] hearing the defendant neither provided nor elicited any evidence that he was questioned in circumstances constituting coercion or custody. That failure of the defendant to meet his threshold burden excused the Commonwealth from proving that Miranda warnings had been provided." *Id*. at 53. Although the failure to establish custody made it unnecessary for the Court to go any further, the Court volunteers that it is not inclined the to revisit its decisions holding that the *Miranda* card need not be introduced at the suppression hearing. *Id*. at 54-55 n. 7. The Court also notes, but does not discuss the merits of, the defendant's claim, raised for the first time on appeal, that the trooper's testimony as to the contents of the *Miranda* card violated the best evidence rule. *Id*. at 55 n.8.

PRACTICE TIP: It is difficult to imagine that trial counsel would have had any difficulty establishing that the defendant was in custody when the challenged statements were made. Perhaps it was because custody was so obvious that counsel moved directly to the adequacy of the warnings without properly developing the custody evidence. The lesson from this should be obvious: When a defendant wishes to challenge a statement on *Miranda* grounds, he must establish that the police elicited it from him while he was in custody. Once he has done so, the burden falls on the prosecution to demonstrate that he was advised of his *Miranda* rights and that he waived those rights. *Commonwealth v. Howard*, 4 Mass. App. Ct. 476, 479 (1976).

ADMISSIONS AND CONFESSIONS: MIRANDA WARNINGS: REQUEST FOR LAWYER; PROMPT ARRAIGNMENT REQUIREMENT

After beating his brother to death with a car-locking device appropriately named The Club, the defendant was sleeping in his car with his two dogs in a parking lot behind the local police station. The police awakened him and told him they were looking for his brother. The defendant agreed to accompany them into the station and to cooperate in the search for his brother. After being questioned by the police, he let them inspect his car while he played with his dogs behind the station. Throughout this time, he was repeatedly told that he was free to leave. After the police found traces of blood in the trunk of his car and confronted him with that fact, the defendant told them he wanted to talk and that he hit his brother. At that point, the police considered him to be in custody, although they did not handcuff him. When they asked him to lead them to the body, he asked if he could talk to a lawyer first. They offered him a telephone, but he declined, asking instead to go outside to his dogs, which he was allowed to do. Shortly thereafter, the police again offered him the chance to use a telephone, but he again refused. He volunteered that it "wasn't premeditated." When asked again where his brother's body was, he offered to take the police there. He ultimately did so and confessed to the murder. The defendant subsequently moved to suppress his statements, arguing that all questioning should have stopped when he invoked his right to counsel. The motion judge held otherwise, and the Supreme Judicial Court affirms. *Commonwealth v. Obershaw*, 435 Mass. 794, 796-802 (2002). The Court classifies the defendant's question whether he "could talk to a lawyer first" before leading the police to the body as an "equivocal statement[or] musing[] concerning the need for an attorney [which] do[es] not constitute . . . an affirmative request" for one. *Id*. at 800. The Court places great weight on the fact that the defendant twice declined to use the telephone to call a lawyer and wanted instead to play with his dogs. (One wonders, however, who he would have called, inasmuch as he was sleeping in his car. It seems unlikely that he had his own lawyer or the means to retain one, and the yellow pages would probably not have been the best place to start looking for a lawyer.) The Court also rejects the defendant's claim that the police improperly delayed his arraignment. The six-hour "safe harbor" period established by *Commonwealth v. Rosario*, 422 Mass. 48 (1996), does not begin to run until a defendant is arrested. "An arrest occurs where there is [1] an actual or constructive seizure or detention of the person [2] performed with the intention to effect an arrest and [3] so understood by the person detained." *Id*. at 802, quoting *Commonwealth v. Cook*, 419 Mass. 192, 198 (1994). Although the police cordoned off the lot in which his car was parked, the defendant was apparently unaware of that fact. He was repeatedly told that he was free to leave, but voluntarily remained to help the police in their investigation. He was permitted to walk outside, unguarded, with his dogs. All of these factors led the Court to agree with the judge below that the defendant was not arrested until after he first admitted hitting his brother – a point less than six hours prior to his inculpatory statements.

ADMISSIONS AND CONFESSIONS: NODDING OR SHAKING HEAD IN RESPONSE TO QUESTIONS, AMBIGUITY

In *Commonwealth v. Marrero*, 436 Mass. 488, 495-496 (2002), the defendant argued that evidence that he nodded or shook his head in response to certain police questions was ambiguous and the trial judge should have excluded the testimony. The Supreme Judicial Court rules otherwise: Nodding one's head "yes" and shaking it "no" are "communicative in nature and constitute[s] admissions by deliberate nonverbal expression." *Id*. at 496.

ADMISSIONS AND CONFESSIONS: PROMPT ARRAIGNMENT REQUIREMENT; FAILURE OF APPOINTED COUNSEL TO NOTIFY POLICE TO HALT QUESTIONING; VOLUNTARINESS, MENTALLY ILL DEFENDANT, LATE NIGHT INTERROGATION

At about 4:00 p.m., the defendant was placed under arrest for beating his girlfriend. She died at 8:55 p.m. At 3:00 a.m., the police interrogated the defendant, and he made incriminating statements. At about 9:25 a.m., C.P.C.S. assigned an attorney to represent the defendant. At 9:40 a.m., the defendant told a police officer escorting him from the identification bureau to a holding cell that he wanted to talk to a detective. He made more incriminating statements to the detective. The denial of his motion to suppress these statements is denied by the Supreme Judicial Court. *Commonwealth v. Beland*, 436 Mass. 273 (2002). The defendant had mental deficiencies which were the subject of disputed expert testimony at the suppression hearing. The Court pays lip service to the principle that "The police, and ultimately judges, must give special

attention to whether a person of low intelligence waived Miranda rights and voluntarily and knowingly made a statement to the police. . . . Circumstances and techniques of custodial interrogation which pass constitutional muster when applied to an adult of normal intelligence may not be constitutionally tolerable when applied to one who is mentally deficient." *Id*., at 281, quoting *Commonwealth v. Hartford*, 425 Mass. 378, 381 (1997). However, the Court defers to the motion judge's conclusion that the defendant's mental deficiencies did not render his Miranda waiver or statements involuntary. Similarly, the Court expresses its disapproval of "the practice of off-hour interrogation, especially when there is no apparent necessity to interrupt a suspect's sleep in the middle of the night or at early morning hours," but finds this circumstance alone to be insufficient to suggest coercion. *Id*. at 284 n.5. With respect to the eleven-hour delay between the defendant's arrest and his first statement, the Court notes that the six-hour safe harbor rule established by *Commonwealth v. Rosario*, 422 Mass. 48 (1996), was inapplicable since this case predated *Rosario*. Applying pre-*Rosario* law, the Court finds that the police complied with their duty to bring the defendant to court for arraignment "as soon as reasonably practical," since the court closed for the day at 4:00 p.m. and there was no evidence that they delayed the arraignment in order to obtain a confession from the defendant. *Id*. at 282-283. Finally, the Court rejects the defendant's claim that his appointed counsel was ineffective in failing to immediately contact the police and instruct them to cease all questioning. The claim of ineffective assistance of counsel was not viable because the right to counsel under the state and federal constitutions does not attach until arraignment, even though a criminal complaint and arrest warrant may have issued. Nor is the Court willing to treat *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000) (which requires the police to notify a defendant in custody at once when a lawyer is trying to contact him) as creating a limited right to counsel before arraignment. *Mavredakis* involved a defendant's self-incrimination rights under Article 12, not the right to counsel, and the Court is unwilling to expand its reach to place an affirmative duty on attorneys "to make contact with their criminal clients so as to act as catalysts for the invocation of those rights." *Id*. at 288.

PRACTICE TIP: The Court's conclusion that a defendant's Sixth Amendment right to counsel does not attach until arraignment, which seems to originate in *Commonwealth v. Smallwood*, 379 Mass. 878, 884-885 (1980), is open to question. The United States Supreme Court has repeatedly said that the right attaches with "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," *McNeil v. Wisconsin*, 501 U.S. 176, 175 (1991), quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), but the right must not only attach; it must also be invoked by the defendant. In *United States v. Harrison*, 213 F.3d 1206 (9th Cir. 2000), the Court hold that, when there is a close nexus between the focus of a criminal investigation and the charges ultimately brought, a defendant's retention of counsel in connection with the investigation, if it is (or should be) known by the government, automatically operates as an invocation of the Sixth Amendment right to counsel once a complaint or indictment issues, so that the police may not initiate questioning of the defendant about the crime charged in counsel's absence after the complaint or indictment has issued. In *State v. Dagnall*, 612 N.W. 2d 680, 236 Wis. 2d 339 (2000), the Wisconsin Supreme Court holds that police cannot question a defendant who has been formally charged with a crime (although not arraigned) after an attorney is retained for him and the attorney tells the police not to question him about that crime. In both cases, the defendant's *Miranda* waiver of his rights (including the right to counsel) was held ineffective, since the police are barred altogether from initiating questioning of a charged defendant who is represented by counsel.

ADMISSIONS AND CONFESSIONS: VOLUNTARINESS: DUTY OF TRIAL JUDGE TO CONDUCT VOIR DIRE SUA SPONTE BEFORE ADMITTING STATEMENT, WAIVER BY DEFENDANT

Incriminating statements made by the defendant to the police and others were admitted in evidence at his first degree murder trial. Although there was evidence that he was intoxicated when he made these statements, he instructed his lawyer not to move to suppress them. Alerted by the prosecutor, the trial judge, who had already voir dired the defendant about his desire not to file a motion to suppress, conducted a colloquy with both defense counsel and the defendant. During that colloquy, they said that they did not contest the voluntariness of the statements and would be satisfied with a humane practice instruction to the jury. They did not request a voir dire on voluntariness as the various statements were received in evidence. On appeal, the Supreme Judicial Court rejects the defendant's contention that the judge should have conducted, sua sponte, a voluntariness voir dire. *Commonwealth v. Serino*, 436 Mass. 408, 412-414 (2002). Although a judge normally has a constitutional obligation to conduct such a voir dire where the voluntariness of a statement is in issue and to rule on voluntariness before the statement is heard by the jury, the defendant's tactical decision to forego the voir dire here was a rational one which the judge could honor. That decision may have been the result of balancing the slim prospect of suppression against the danger that the testimony of the prosecution's witnesses would improve through rehearsal; or it may have reflected a conclusion that the testimony about the statements would actually support the defense that the defendant was too intoxicated to premeditate.

APPELLATE PRACTICE: INTERLOCUTORY APPEAL, ABUSE PREVENTION ORDER IN DIVORCE CASE

An interlocutory appeal to the Appeals Court under G.L. c. 211A, §10, may be brought to challenge the issuance of an abuse prevention order under G.L. c. 208, § 18, by a probate court during divorce proceedings. *Sertel v. Kravitz*, 54 Mass. App. Ct. 913 (2002).

APPELLATE PRACTICE: INTERLOCUTORY APPEAL BY PROSECUTION, RIGHT OF DEFENDANT TO RAISE OTHER INTERLOCUTORY ISSUES

In *Commonwealth v. Levesque*, 436 Mass. 443, 455 (2002), summarized at Crimes: Manslaughter, Involuntary: Failure to Notify Fire Department of Fire One Accidentally Starts, a judge denied the defendants' *O'Dell* motion, but allowed their *McCarthy* motoin and dismissed the indictments. The prosecution was allowed to appeal the dismissal. Although a defendant cannot normally obtain interlocutory review of the denial of his motion to dismiss, the defendants here were permitted to argue the merits of their *O'Dell* motion to dismiss (claiming that misleading evidence was presented to the Grand Jury). The Supreme Judicial Court holds that it can consider any ground apparent on the record in deciding whether to affirm the allowance of the *McCarthy* motion, and it can rule that the judge was "right for the wrong reason, even relying on a principle of law not argued below." *Id*. at 455.

APPELLATE PRACTICE: NOTICE OF APPEAL, TIMELINESS

The defendant in a civil action filed a notice of appeal to challenge an order disqualifying its counsel due to a conflict of interest. The left hand column of the superior court docket sheet next to the notation recording the issuance of the contested order contained the date "06/21/2001." However, the notation itself read "order . . . Notice sent 6/20/01 (entered 6/20/01)." If the order was entered on June 20, the notice of appeal would have been late by one day. *G. D. Matthews & Sons Corp. v. MSN Corp.*, 54 Mass. App. Ct. 18, 24-26 (2002). The Appeals Court holds that the appeal was timely. The ambiguity of the dates on the docket sheet was not the fault of either party, but of the clerk. The Court therefore applies the "evolving rule that a procedural tangle having its origin in a failure by the court . . . to observe the mandates of rules will generally be resolved in favor of preserving rights of appeal where this result is technically possible and does not work unfair prejudice to other parties." *Id*. at 25, quoting *Standard Register Co. v. Bolton-Emerson, Inc.*, 35 Mass. App. Ct. 570, 574 (1993).

APPELLATE PRACTICE: PRESERVATION OF OBJECTION TO FAILURE TO GIVE JURY INSTRUCTION, REVERSIBLE ERROR

See *Commonwealth v. Williams*, 54 Mass. App. Ct. 236, 241-244 (2002), summarized at Identification: Jury Instructions, Failure to Give *Rodriguez or Pressley* Instruction, for a case in which defense counsel's request that the judge give counsel's proposed instruction on identification, rather than the model instruction normally given, preserved the issue of the judge's refusal to give any identification instruction at all. That refusal to instruct was reversible error, since identification was the major issue in the case, and the evidence that the defendant was the actual perpetrator ("one eyewitness, no corroborating evidence, and contrary defense testimony") was insufficient to assure the Court that the result would have been the same if proper identification instructions had been given. *Id*. at 244.

APPELLATE PRACTICE: RECONSTRUCTED RECORD, BINDING ON PARTIES

Commonwealth v. Williams, 54 Mass. App. Ct. 236, 246 n.13 (2002), discussed at Crimes: Drugs: School Zone Violation, Sufficiency of Evidence, involved a tape-recorded District Court trial with many gaps in the record which had to be resolved by reconstruction pursuant to Mass. R. App. P. 8. On appeal, the prosecution hinted that the record's shortcomings of proof on the police measurement of the school zone distance may have been the result of inadequate preservation of the actual testimony. The Court was unsympathetic: "The Commonwealth had ample opportunity in the reconstruction process to contest any facts set forth in the affidavit of defense counsel and to file one of its own. Both parties must now rest on that reconstructed record and live with any shortcomings in it." 54 Mass. App. Ct. at 246 n.13.

APPELLATE PRACTICE: REVIEW UNDER G.L. c. 211, § 3; CERTIORARI; HABEAS CORPUS

Relief from a single justice under G.L. c.211, § 3, to remedy an alleged trial court error is available only when "review of the trial court decision cannot adequately be obtained on appeal from any adverse judgment in the trial court or by other available means." S.J.C. Rule 2:21(2). Conclusory references to "irremediable harm" and to an appeal "possibly being 'fruitless'" in *Glawson v. Commonwealth*, 436 Mass. 1007 (2002), were not sufficient to meet this requirement in an interlocutory challenge to an order compelling the petitioner to give blood and hair samples to the Commonwealth. In the event that the results did not exculpate the petitioner and were admitted at trial, the petitioner could raise the issue in an appeal from his conviction. The petitioner in *Sibinich v. Commonwealth*, 436 Mass. 1008 (2002), was aggrieved by the

refusal of the trial court clerk to assemble the record for appeal because the notice of appeal was allegedly late. A single justice of the Appeals Court denied the petitioner's motion to compel the clerk to act. Rather than filing a c. 211, § 3, petition to challenge that denial, the petitioner could have either appealed the decision of the single justice to a three-judge panel of the Appeals Court pursuant to Mass. R. App. P. 15(c) and Rule 2:02 of the Rules of the Appeals Court (1975); or he could have filed a motion in the trial court seeking to compel the clerk to assemble the record, and then, if the motion were denied, he could have appealed the denial. The petitioner in *Shirley S. v. Commonwealth*, 435 Mass. 1014 (2002), who was aggrieved by a juvenile judge's denial of her motion to dismiss delinquency proceedings against her, was required to wait until after trial to challenge that ruling. Refreshingly, in *Commonwealth v. O'Neil*, 436 Mass. 1007 (2002), it was the prosecution that ignored other available remedies and sought c. 211, § 3, relief. The prosecution claimed to be aggrieved by an opinion of the Appeals Court which granted the defendant a new trial, instead of remanding the case for an evidentiary hearing, on his ineffective assistance claim. The prosecution, however, could have obtained relief for any error by petitioning the Appeals Court for a rehearing or by applying for further appellate review by the Supreme Judicial Court. The petitioner in *Picciotto v. Superior Court*, 436 Mass. 1001 (2002), fared no better by commencing an action in the nature of certiorari under G.L. c. 249, § 4, in the single justice session of the Supreme Judicial Court. She wanted to challenge a superior court judge's refusal to recuse himself from the case and his refusal to allow her to proceed pro se. The reason for the recusal request was that the judge had excluded the petitioner from the courtroom during proceedings in the case and supposedly had some sort of relationship with opposing counsel. Certiorari is only available to correct errors that "are not otherwise reviewable by motion or by appeal," and the alleged errors here were clearly amenable to the normal appellate process. The petitioner in *Soura, Petitioner*, 436 Mass. 1003 (2002), embarked down yet another dead-end avenue – a habeas corpus petition under G.L. c. 248, § 1– to challenge alleged irregularities in his convictions. His claim was that his acquittal on two of four child rape charges somehow nullified his convictions on two other such charges. A habeas petition filed in the trial court was treated as a motion for a new trial under Mass. R. Crim. P. 30 and denied. Instead of appealing this denial, the defendant filed yet another habeas petition – this time in the single justice session of the Supreme Judicial Court. The Court holds that the proper vehicle for raising the claim was a new trial motion and that the petitioner, if aggrieved by the trial court's denial of the motion, should have appealed the denial. A habeas petition is not appropriate when the petitioner's claims "center on the indictment, trial, conviction, and sentencing stages of the criminal proceedings against him." *Id*.

APPELLATE PRACTICE: SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE

In *Commonwealth v. Parkes*, 53 Mass. App. Ct. 815, 820-821 (2002), summarized at Evidence: Hearsay: State of Police Knowledge Exception, a state trooper was improperly allowed to testify about multiple calls to the police reporting that the defendant had exposed himself. Defense counsel brought out in cross-examination that the state trooper's written report concerning the incident made no reference to multiple calls. The prosecution argued on appeal that there was no substantial risk of a miscarriage of justice because defense counsel made a tactical decision to allow in the offending testimony so that he could impeach the trooper in this fashion. The Appeals Court wisely observes that the trooper's credibility "was of minor importance in the case," which turned on the credibility of the trucker who claimed to have seen the defendant expose himself. "The defendant could only be harmed by this evidence [that others reported seeing the defendant expose himself], and we view counsel's later efforts [to impeach the trooper] as damage control once it was first admitted." *Id*. at 821. Nor was the prosecution's evidence overwhelming. Far from it, the case turned on the testimony of the trucker about an incident that occurred after midnight and "lasted for only four or five seconds." *Id*. at 820.

APPELLATE PRACTICE: TRANSCRIPT, DELAY IN PREPARING

Trial counsel filed an appeal of the defendant's district court drug conviction on October 31, 1996. Appellate counsel ordered the audiotapes of the trial and pre-trial hearings on March 27, 1997. The trial tapes were not located until more than two years later in August 1999, at which time they were promptly transcribed. Although characterizing the delay in locating the trial tape as "deplorable," the Appeals Court rejects the defendant's argument that this delay violated his due process rights. "For due process rights to be implicated as a result of a delay in the appellate process, the defendant must demonstrate that the Commonwealth deliberately blocked his appellate rights or that he was significantly prejudiced by the delay." *Commonwealth v. Fisher*, 54 Mass. App. Ct. 41, 47-48 (2002). According to the Court, the defendant here established neither: The delay was attributable "more to bureaucratic inattention or ineptitude than to intentional scheming," *id*., quoting *Commonwealth v. Santos*, 41 Mass. App. Ct. 621, 628 (1996), and "the defendant has not shown that his ability to present arguments on appeal has been hindered by the passage of time." 54 Mass. App. Ct. at 47.

PRACTICE TIP: It is hard to imagine a case in which a defendant could meet this burden and show a due process violation in an appellate transcript delay. The Court does, however, offer some practical suggestions for dealing with

transcript delays, including bringing the delay to the trial judge's attention through a motion in the trial court or reporting the problem to the clerk of the Appeals Court. 54 Mass. App. Ct. at 48 & n.8.

COMPLAINTS: ISSUANCE, MOTION TO DISMISS, SHOW CAUSE HEARING

At arraignment in the Boston Municipal Court, the defendant, a landlord accused of assaulting his tenant, claimed that the clerk-magistrate at the show cause hearing had denied his witness the opportunity to testify. The judge gave the defendant a "do-over" in front of a different clerk-magistrate. When the second clerk-magistrate also found probable cause and issued a complaint, the defendant "appealed." Appearing before the same judge who had vacated the first complaint, he claimed that a police officer who was a friend of the complainant had improperly been allowed to question the defendant and "make comments" at the hearing. The judge decided to conduct his own show-cause hearing. At its conclusion, he found no probable cause. The prosecution filed a petition under G.L. c. 211, § 3, to challenge the outcome. *Commonwealth v. DiBenadetto*, 436 Mass. 310 (2002). A district court or BMC judge has, under *Bradford v. Knight*, 427 Mass. 748, 753 (1998), inherent authority to rehear the *denial* of a complaint application by a clerk-magistrate. However, the Court holds in *DiBenadetto* that the judge has no such authority when the clerk-magistrate issues a complaint. In such cases, the defendant's only recourse is a motion to dismiss. In fact, a district court defendant apparently may move to dismiss a complaint due to defects in the show cause proceedings on any of the grounds on which a superior court defendant might move to dismiss an indictment due to irregularities in the grand jury presentment. The *DiBenadetto* opinion specifically mentions a motion to dismiss "for a failure to present sufficient evidence to the clerk-magistrate (or judge), see *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), for a violation of the integrity of the proceeding, see *Commonwealth v. O'Dell*, 392 Mass. 445 (1984), or for any other challenge to the validity of the complaint." 436 Mass. at 313. The Court suggests that the defendant's objections to the two show cause hearings here should have been raised in such a motion to dismiss. *Id*. at 314. It also offers some general thoughts on the conduct of the show cause hearing: While the magistrate has considerable discretion to limit the testimony at the hearing, she may not "unreasonabl[y]" restrict the accused's opportunity to present witnesses, since to do so would deprive the accused of the statutory right to "an opportunity to be heard" under G.L. c. 218, § 35A. On the other hand, this right to be heard does not include a right to cross-examine adverse witnesses. *Id*. at 314-315.

PRACTICE TIP: While this announcement of the breadth of available challenges to the issuance of a district court or BMC complaint is encouraging, the Court's opinion fails to suggest how defense counsel should go about discovering or proving the defects in an unrecorded show cause hearing. Also, note that, under G.L. c. 218, § 35A, the accused is only entitled to a show-cause hearing on the issuance of a complaint when the crime charged is a misdemeanor.

COMPLAINTS: ISSUANCE, RIGHT TO SHOW CAUSE HEARING

Aggrieved by the refusal of a district court clerk to hold a hearing on his applications for criminal complaints against two police officers who had arrested him, the complainant filed a petition under G.L. c. 211, § 3, in the single justice session of the Supreme Judicial Court. On review of the single justice's denial of the petition, the Court holds that an applicant for a criminal complaint has no right to a hearing on his application. The hearing is solely for the benefit of the alleged wrongdoer. Nor does the complainant have a right to challenge the denial of the issuance of a criminal complaint. His rights extend no further than being entitled to file the application and to have the court rule on it. *Scott v. Dedham Division of the District Court Department*, 436 Mass. 1004 (2002).

COUNSEL: CONFLICT OF INTEREST

In *Mickens v. Taylor*, 122 S.Ct. 1237 (2002), the United States Supreme Court decides, with four justices dissenting, that, in order to establish a Sixth Amendment violation that would justify vacating his capital murder conviction, the defendant had to show not only that an alleged conflict of interest existed, but also that it adversely affected his trial counsel's performance. At the time of the murder for which the defendant was charged, defense counsel represented the juvenile victim in a delinquency case. The same judge who dismissed the delinquency case due to the juvenile's death appointed defense counsel in the murder case. Counsel did not object to his own appointment, and neither the judge nor counsel informed the defendant of the conflict. The Court leaves open the possibility that the defendant might also have to establish in a case such as this, where there was no objection to the conflict, a reasonable probability that, but for the conflict, the result of the trial would have been different. *Id*. at 1245-1246. (Earlier Supreme Court cases eliminated this last requirement in the case of concurrent representation of codefendants to which counsel has objected.)

COUNSEL: INEFFECTIVE ASSISTANCE: FAILURE TO CONSULT DEFENDANT ABOUT LESSER INCLUDED OFFENSE INSTRUCTION

See *Commonwealth v. Donlan*, 436 Mass. 329 (2002), summarized at Sexual Assault: Rape, Penetration, Lesser Included Offense.

COUNSEL: INEFFECTIVE ASSISTANCE: FAILURE TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTION

See *Commonwealth v. Mills*, 54 Mass. App. Ct. 552 (2002), summarized at Jury Instructions: Lesser Included Offenses, Failure of Defense Counsel to Request Instruction.

COUNSEL: INEFFECTIVE ASSISTANCE: FAILURE TO RETAIN INDEPENDENT EXPERT TO EVALUATE DEFENDANT FOR COMPETENCY

In *Commonwealth v. Serino*, 436 Mass. 408, 414-416 (2002), discussed at Admissions and Confessions: Voluntariness: Duty of Trial Judge to Conduct Voir Dire Sua Sponte Before Admitting Statement, Waiver by Defendant, the defendant argued that his trial counsel was ineffective in failing to retain an independent expert to evaluate his competence to stand trial. A court psychiatrist had twice evaluated the defendant before trial and unequivocally found him competent. The defendant's argument that an independent expert would have found him incompetent was hampered by the fact that, in his motion for new trial, appellate counsel produced no affidavit from trial counsel, postconviction psychiatric evaluation, or other evidence to support the argument. This failure was to some extent understandable because the motion judge, in accordance with then-existing law, had ruled that he lacked the power to allocate funds for an independent evaluation in the context of the new trial motion. The Supreme Judicial Court agrees with the motion judge that the defendant failed to show that "better work might have accomplished something material for the defense." *Id*. at 416.

PRACTICE TIP: In light of recent developments, at least two avenues are now potentially available to obtain a psychiatric examination of an allegedly incompetent defendant in the context of a new trial motion: (1) In *Commonwealth v. Conaghan,* 433 Mass. 105, 110-111 (2000), the Supreme Judicial Court held that the motion judge is empowered to order such an examination pursuant to G.L. c. 123, § 15(a), "whenever" she doubts the competence to stand trial or criminal responsibility of a defendant – even after trial in the context of a motion for a new trial. (2) Mass. R. Crim. P. 30(c)(5) has recently been amended to permit the allocation of funds to the defendant to pay for costs associated with a new trial motion, including presumably the cost of a psychiatric expert. 435 Mass. 1502 (2001). In pursuing either of these approaches, however, counsel should support. the request with affidavits establishing a basis for believing that a serious question as to the defendant's competence at the time of trial exists. If an affidavit from the defendant's trial attorney is not feasible, counsel should consider submitting his or her own affidavit explaining the reasons why it is not.

COUNSEL: INEFFECTIVE ASSISTANCE: TRIAL STRATEGY, MANIFESTLY UNREASONABLE

The defendant was a customer of the video store where the complainant worked. On the evening in question, he was giving her a ride home from work when, with her agreement, they stopped by his apartment so that he could get something. She ended up sitting on his bed, and he made advances to her that included touching her breast and genital area. At some point, she became upset and said to stop. He called a cab for her. The complainant's sister ultimately contacted the police about the incident, and the defendant was charged with indecent assault and battery. At trial, defense counsel tried "to show that the defendant mistakenly and in good faith believed that the complainant had consented to the physical contacts, and that as soon as he discovered she did not consent to such activities, he ceased his advances and apologized." *Commonwealth v. McCrae*, 54 Mass. App. Ct. 27, 29 (2002). In presenting this defense, counsel essentially conceded that the complainant had not consented. She told the jury, for example, "Hindsight is twenty-twenty, and now we can see that [the defendant] might have moved faster than she wanted him to;" and that the defendant "took [the complainant's presence in his bedroom] as a sign of mutual consent," and he was "simply a man who liked a woman. He thought she liked him back." *Id*. at 30, n.4. Counsel's trial strategy was "manifestly unreasonable," since the Massachusetts courts have repeatedly held that an honest mistake as to the complainant's consent is not a defense to a charge of sexual assault. When defense counsel conceded lack of consent in favor of this unavailable defense, she abandoned the only reasonably viable defense. The indecent touching was undisputed, and thus the concession of lack of consent was tantamount to an admission of the defendant's guilt. This choice of trial strategy was ineffective assistance of counsel, and the defendant's convictions were overturned.

CRIMES: ARMED ASSAULT WITH INTENT TO MURDER: SUFFICIENCY OF EVIDENCE

Responding to the scene of a one-car accident, the complainant encountered the defendant, covered with blood. The complainant began to dial his cell phone – presumably to call for aid. The defendant grabbed the phone, yelling, "Don't do it," and tossed the phone into the nearby woods. He then pulled out a gun and, from a distance of ten feet, pointed it at

the complainant's chest. As the complainant dove for cover, he heard a gunshot, but he could not say in which direction it was fired. The telephone was later discovered, pierced by a bullet fired at close range. The complainant ran for help, while the defendant walked off in the opposite direction. Numerous police officers responded to the scene. A chase and then a standoff ensued, with many shots fired at the police by the defendant. After he surrendered, the defendant was charged with, and convicted in a jury-waived trial of, multiple counts of armed assault with intent to murder and assault by means of a dangerous weapon, among other offenses. *Commonwealth v. Armstrong*, 54 Mass. App. Ct. 594 (2002). He argued on appeal that a required finding should have been entered on the charge of armed assault with intent to murder the civilian complainant because the evidence suggested that the single gunshot was fired at the telephone, rather than at the complainant, and there was insufficient evidence of an intent to kill. While finding "surface appeal" in this argument, the Court holds that the evidence was adequate. It rather unconvincingly explains that "[t]he aiming of the weapon at [the complainant] combined with the defendant's threat and his subsequent firing of the gun in close proximity to [the complainant] provides a sufficient basis for finding an intent to murder." The Court also finds the defendant's subsequent actions in firing at the police probative of his intent to kill the complainant as well. *Id*. at 599.

CRIMES: ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON: SHOD FOOT AS DANGEROUS WEAPON

See *Commonwealth v. Mills*, 54 Mass. App. Ct. 552, 554-555 (2002), summarized at Jury Instructions: Lesser Included Offenses, Failure of Defense Counsel to Request Instruction, where the Court opines that whether a particular item of footwear (boots that "were almost in between a heavy sneaker and a construction boot or a snow boot") was a dangerous weapon was a question of fact for the jury.

CRIMES: ASSAULT AND BATTERY ON A POLICE OFFICER, EXCESSIVE FORCE INSTRUCTION

An arrestee may defend himself with "such force as reasonably appears to be necessary," if the arresting officer uses "excessive or unnecessary force to subdue" him. *Commonwealth v. Moreira*, 388 Mass. 596, 601 (1983). In *Commonwealth v. Williams*, 53 Mass. App. Ct. 719, 722-723 (2002), summarized at Defenses: Self-Defense, Entitlement to Instruction, the Court holds that the defendant was properly denied an instruction on excessive or unnecessary force because the evidence, viewed in the light most favorable to him, did not provide support for a claim of such force. In reaching this conclusion, the Court suggests that, as with a self-defense claim, it will be difficult for a defendant to raise the issue of excessive force through mere cross-examination of prosecution witnesses. Cross-examination of police witnesses that only raises doubts as to the credibility of their claims of "reasonable force" would not be affirmative proof of excessive force, and would not entitle the defendant to an instruction.

CRIMES: ASSAULT BY MEANS OF A DANGEROUS WEAPON: ATTEMPTED BATTERY, SUFFICIENCY OF EVIDENCE

In *Commonwealth v. Purrier*, 54 Mass. App. Ct. 397 (2002), the defendant was charged with assault by means of a dangerous weapon. The trial judge instructed the jury (as judges frequently do in assault cases) on both theories of assault: attempted battery (which requires no proof of the victim's fear), and placing another in fear of an immediately threatened battery. As a result, in order to preserve the ensuing conviction, the Appeals Court had to determine that the evidence was sufficient to sustain the general verdict on both theories. See *Commonwealth v. Plunkett*, 422 Mass. 634, 638 (1996). The case arose at 1:00 one morning when the defendant used his key to enter the home of his recently estranged girlfriend, the mother of his children. He found her in bed with another man, the soon-to-be complainant. Enraged, the defendant began arguing with his girlfriend and told the complainant to leave. According to the complainant, the defendant was yelling words which for the most part were incomprehensible but which left little doubt that he wanted to hurt the complainant. As the complainant struggled to get dressed, the defendant opened a folding knife. He wielded the knife as he, the complainant, and the girlfriend "mov[ed] in positions around the room." As he moved toward the complainant, the girlfriend stepped between them. She was punched in the mouth by the defendant. According to the complainant, the defendant demanded his wallet and reached around the girlfriend to take it from him. Ultimately, the complainant ran from the room with the defendant following. On appeal, the defendant conceded that this evidence was sufficient to warrant a conviction for assault of the "immediately threatened battery" variety. The Appeals Court holds that the evidence was also sufficient to warrant a conviction for assault of the "attempted battery" variety. This type of assault, like any other crime of attempt, requires proof that the defendant undertook "some overt step towards accomplishing" his goal (here, a harmful or unpermitted touching), and that he "came reasonably close to doing so." *Id*. at 401, quoting Model Jury Instruction for Use in the District Court 5.402. (Another recent case, *Commonwealth v. Hamel*, 52 Mass. App. Ct. 250, 256-257 (2001), phrases the requisite proximity to fulfilment of the attempted crime as "dangerously close.") The Court declines to fashion a "bright line rule" as to the kind of overt act required, stating instead that that is a question of fact for the jury, and must be determined on a case-by case basis." *Id*. at 402. Here, the Court

holds that the defendant's obvious anger, his wielding of the knife, his approach toward the complainant, and his reaching around his girlfriend toward the complainant when she intervened was sufficient evidentiary support.

CRIMES: DOMESTIC ABUSE: NO-CONTACT ORDER, UNINTENTIONAL VIOLATION

The defendant was tried on a charge of violating an abuse prevention order under G.L. c. 209A which prohibited any contact with his ex-wife. On the day in question, he had gone to a house he and his mother owned jointly in order to clean the house as ordered by the local health authority and to get some clothes. Although the prosecution offered evidence to the contrary at trial, the defendant maintained that he did not see his ex-wife's car parked in a neighbor's driveway or know that she was at the house when he arrived. When he entered, he encountered his two sons and a fracas broke out between his sons and him. The fracas ended with his sons holding him down and shouting to their mother, the defendant's ex-wife, to call the police. It was only at that point, when the defendant was restrained from leaving, that he saw his ex-wife. The judge's charge, stripped of inapplicable surplusage, framed the relevant inquiry as whether the defendant had violated the order "by contacting the alleged victim." During deliberations, the jury asked if they needed to "decide whether [the defendant] violated it or intended to violate it" and whether one violates an order if one is "unaware of the party being within 100 yards." The judge expressed to counsel the view that a defendant with no knowledge of the presence of the protected person could still be convicted. He responded to the jury's questions by merely repeating his earlier instructions. *Commonwealth v. Raymond*, 54 Mass. App. Ct. 488 (2002). After reviewing in some detail several recent cases on the issue, the Court vacates the defendant's conviction, concluding that the "cases suggest, as does common sense, that a defendant cannot be convicted of violating a 'no contact' order . . . where the contact occurs in circumstances where the defendant did not know, or could not reasonably have been expected to know, that the protected person would be present." *Id*. at 493. If the jurors accepted the defendant's version of the events, "they could have found that the . . . contact . . . was incidental to a permitted activity [i.e., cleaning, and obtaining clothes from, a house which he and his mother owned], or an accidental, mistaken, or unknowing violation, or even a coerced violation given that the contact took place while he was restrained by his sons." *Id*. at 494. Reversal was required because the trial judge did not explain the relevance of these considerations to the jurors, especially where their questions showed their confusion and uncertainty about these considerations.

CRIMES: DRUGS: DISTRIBUTION, EXPERT POLICE TESTIMONY

The defendant was accused of distributing cocaine in the theater district of Boston with the help of a codefendant who would solicit buyers, walk over to the defendant and obtain the cocaine from him, deliver it to the buyer, and then return to the defendant with the cash from the sale. The prosecution presented its case through police officers who witnessed such an alleged sale and subsequently recovered a bag of cocaine from the buyer and cash from the defendant. *Commonwealth v. James*, 54 Mass. App. Ct. 908 (2002). At trial, the prosecutor sought to elicit testimony from one of the surveillance officers describing "steps that people selling crack cocaine in the [theater district] use to reduce the risk of being caught with crack cocaine on them." According to the Appeals Court, such testimony, if given, would have been "potentially suspect as 'profile' evidence." Also, the prosecutor's attempt to elicit testimony from the same witness, "who had already served as a modus operandi expert . . . , as well as the key percipient witness," that the events observed were "consistent with" a drug transaction "ran the risk of 'trespass[ing] on the jury's prerogative as triers.'" *Id*. at 909, quoting *Commonwealth v. Frias*, 47 Mass. App. Ct. 293, 296-297 (1999). Neither risk materialized due to the witness's failure to follow the script and rulings by the judge excluding the testimony. However, the defendant's conviction is reversed for other reasons, and the Appeals Court gently warns the prosecution to avoid such tactics at the retrial or "risk having to participate in a third trial." 54 Mass. App. Ct. at 910.

CRIMES: DRUGS: INTENT TO DISTRIBUTE: EXPERT POLICE TESTIMONY, EVIDENCE OF PRIOR DRUG DISTRIBUTION, SUFFICIENCY OF EVIDENCE

In *Commonwealth v. Gollman*, 436 Mass. 111 (2002), the Supreme Judicial Court approves the introduction of evidence of drug sales made by the defendant weeks before as proof that he intended to distribute drugs found on his person. The defendant sold an eight-ball of crack to an undercover officer on December 5, 1997. On January 2, 1998, he sold another undercover officer two bags of crack, the heaviest "weighing at least one-half gram." Also, on four occasions between November1, 1997 and February 6, 1998, he sold eight-balls to another individual. On February 17, he was arrested on a warrant for dealing crack. During a search incident to the arrest, the police found a 2.71 gram piece of crack cocaine in his sock. He was consequently charged with possession of cocaine with intent to distribute it and a school zone violation. The two sales to undercover officers were joined for trial with these latest charges, but the defendant pled guilty to them (as well as to a conspiracy charge involving the four eight-ball sales) and went to trial only on the cocaine found in his sock. In the jury-waived trial, the judge allowed in evidence over defense objection the facts to which the defendant admitted when he pled guilty to the other drug charges. He also allowed one of the arresting officers to give expert

opinion testimony that, based on the evidence and the circumstances of the case, the 2.71 grams of crack was consistent with an intent to distribute, but not with personal use. The Appeals Court reduced the defendant's ensuing conviction from possession with intent to simple possession of cocaine because in its view the prior sales were not admissible, and, without that evidence, there was insufficient proof of an intent to distribute the cocaine. Also, the officer's opinion testimony about the defendant's intent was, as the Appeals Court saw it, "[a] mere guess or conjecture . . . in the form of a conclusion from basic facts that do not tend toward that conclusion any more than toward a contrary one," and it "ha[d] no evidential value." *Commonwealth v. Gollman*, 51 Mass. App. Ct. 839, 849 (2001). The Supreme Judicial Court, having granted further appellate review, disagrees on all points and affirms the defendant's convictions for possession with intent and a school zone violation. According to the Court, it was within the trial judge's discretion to conclude that the prior drug sales which "occurred six and ten weeks prior" were "sufficiently related in time to be logically probative" of the defendant's intent to sell the 2.71 grams of crack, rather than to consume it himself. 436 Mass. at 115. The Court unconvincingly argues that the circumstances surrounding the 2.71 grams paralleled the circumstances of the two sales to undercover officers. For example, it points to an alleged similarity in the quantities of cocaine in the undercover sales – a single eight-ball [i.e., 3.5 grams] in one sale, and two bags of crack, one weighing at least 0.5 grams in the other – and the 2.71 grams of cocaine ("approximately one 'eight ball'") here. The Court also points to the use of female accomplices in the undercover sales and the presence of a woman in the back seat of the defendant's car when he was arrested with the 2.71 grams in his sock. Most outrageously, the Court finds similarity in the very differences between the incidents. The undercover sales each took place in a different apartment. The Court's take on this is that the defendant's practice in the two undercover sales was to "change[] venues to conduct his sales." In Alice-in-Wonderland fashion, the Court sees the fact that the defendant was not in any apartment at all, but rather sitting in a car in downtown Pittsfield when arrested with the 2.71 grams, as consistent with this practice of always using "different venues." *Id*. at 114. Following this logic, wherever the defendant was – as long as he was not in one of the two apartments that hosted the previous undercover sales – would have been probative that his intent was to sell the cocaine in his sock. The Court is equally indulgent of the officer's so-called expert testimony about drug dealing. The officer testified that the average amount of cocaine sold for personal use is 0.1 grams, so that the 2.71 gram rock of cocaine could have been split into 27 pieces and sold for $540 on the street; and that, although 3.5 grams is the proper weight of an eight-ball, he knew of eight-balls as light as 2.2 grams being sold. The Court holds that the trial judge did not err in admitting this officer's opinion that the cocaine in the defendant's sock was not "consistent with" personal use. *Id*. at 115-116. The Court so holds with no mention whatsoever of the carefully considered opinion in *Commonwealth v. Tanner*, 45 Mass. App. Ct. 576, 581 (1998), that a police expert's testimony that facts were more "consistent with" an intent to distribute than simple possession "amounts to little more than vouching for the Commonwealth's position," and that "the mere use of the 'consistent with' formulation should not amount to a sure safe harbor for prosecutors." The Court does at least hint that the concern about the officer's testimony might have been greater if the case had been tried to a jury: "The defendant was not prejudiced by the [officer's] testimony *before an experienced trial judge in a jury-waived trial*." Nonetheless, it prominently cites that testimony, as well as the evidence of the prior drug sales, in concluding that the evidence was sufficient to establish the defendant's intent to distribute the cocaine. The Court also refers to the defendant's possession of an "operational pager . . . , a traditional accouterment of the illegal drug trade," and the absence from his possession of any paraphernalia for smoking the crack. With respect to the pager, the Court notes in a footnote that "many people carry paging devices," but suggests that such possession takes on special significance when possessed in conjunction with drugs. *Id*. at 114 n.2. See also *Commonwealth v. Evans*, 436 Mass. 369, 371-372, 376-377 (2002) (officer testifies that, based on the amount of cocaine and the way it was packaged [nine individually wrapped rocks and two eight-ball sized chunks, with a total street value of $1,500], and the defendant's possession of a pager and $162 in cash, the evidence was consistent with an intent to distribute; the Court finds the underlying evidence and the officer's opinion testimony sufficient to sustain a finding of intent to distribute).

CRIMES: DRUGS: POSSESSION, KNOWLEDGE, CONTENTS OF PARCEL POST PACKAGE

Four large boxes containing 219 pounds of marijuana were sent by parcel post from Arizona to a Leominster address. Law enforcement officials intercepted the boxes. A state trooper, dressed as a UPS driver, then delivered them to the intended address. Shortly before the delivery, the defendant and a companion arrived in a pickup truck at the address and went inside. The defendant left when the UPS truck arrived. His companion and another man accepted the delivery of the four boxes. Ten to twenty minutes later, the defendant returned in the truck, backing up to a doorway where the boxes had been stacked. He and the other two men were loading the boxes into the bed of the truck when the police arrived. He told the police that a friend (whose name he could not remember) had called from "far away, maybe California or Arizona," and offered him $200 to pick up a man named Juan at a Westminster motel, and that Juan then asked the defendant to drive him to the address to pick up some packages. Convicted of trafficking in marijuana, the defendant argued on appeal that the evidence was insufficient to show that he was aware of the contents of the boxes.

Commonwealth v. Alcala, 54 Mass. App. Ct. 49 (2002). He relied on the following language in *Commonwealth v. Aguiar*, 370 Mass. 490, 499 (1976): "In the absence of other evidence, possession of an unopened package, containing drugs, addressed to another and received through the mail moments before his arrest, would not warrant an inference beyond a reasonable doubt that a defendant possessed the drugs knowingly." The *Alcala* court, however, finds enough "other evidence" to warrant such an inference. The evidence justified an inference that the defendant tried to keep himself and his truck out of sight as the UPS delivery was made. The quick removal of the boxes, unopened, from the delivery location supported an inference of a plan to use that location merely as an interim point of delivery. These factors, together with the consciousness of guilt displayed by the defendant's "incredible" statement to the police, justified a finding that he was aware of the contents of the boxes. *Id*. at 51-52.

CRIMES: DRUGS: SCHOOL ZONE VIOLATION, MEASUREMENT

The defendant sold cocaine to an undercover police officer at a location 1,017 feet from "the cornerstone of the Arnone School building" in Brockton. The prosecution produced police testimony that the sale location was 937 feet from "a point described . . . as 'past a rounded curbstone' that bordered a grassy area of the [school]." A school department employee testified that "there was a staircase leading from th[is] grassy area to a school doorway." The prosecution did not present any evidence that the school owned the grassy area, "[n]or was there any documentary evidence such as a deed or plan to show the boundaries of the parcel of land comprising the school." This evidence was nonetheless sufficient to survive the defendant's required finding motion on the school zone charge. *Commonwealth v. Johnson*, 53 Mass. App. Ct. 732 (2002). Under the language of G.L. c. 94C, § 32J, the question was whether the grassy area was part of the "real property comprising" the school. The Court rejects the defendant's argument that this language requires "some evidence of the legal boundaries of the parcel in question as well as some showing of a legal claim of right to use that parcel for school purposes." According to the Court, "[i]t is sufficient to show that the point [to which the measurement was made] was on land used for school purposes." 53 Mass. App. Ct. at 734. The testimony of the school employee here was sufficient to permit the jury to infer that he "ha[d] personal knowledge that the point at which the measurement was taken was on property used for school purposes."

PRACTICE TIP: The analysis in *Johnson*, which emphasizes the actual use of the property rather than its legal ownership or boundaries, may be helpful to defendants when the property on which a school, preschool, or headstart facility is located is used for other purposes as well. For example, many colleges have a daycare center on their campus. Although the center may be located on a very large single piece of property owned by the college, *Johnson* suggests that the school zone should be measured outward from the area used for child care center purposes, rather than from the borders of the college's property. In the case of a child care center or school located in a building which houses other activities as well, the measurement might have to be to the part of the building used for the child care center or school.

CRIMES: DRUGS: SCHOOL ZONE VIOLATION, SUFFICIENCY OF EVIDENCE

In *Commonwealth v. Williams*, 54 Mass. App. Ct. 236, 244-247 (2002), summarized at Identification: Jury Instructions, Failure to Give *Rodriguez or Pressley* Instruction, the defendant was charged with a school zone violation. Testimony of a police officer "upon personal knowledge" that the school in question was an elementary school was sufficient to survive a required finding motion. (The testifying officer's two children were attending the school and he formerly worked as a crossing guard there.) ***Id.*** at 245 n.11. However, testimony that the school was 680 feet from the place of the defendant's *arrest* was insufficient as a matter of law to warrant a finding that the *drug transaction* took place within 1,000 feet of the school. The arrest took place eighteen days after the transaction and the reported testimony went no further than asserting that the arrest was made "in the same area" as the sale. The Court is unwilling to resolve ambiguities in the record in favor of an inference that the 680-foot measurement was made to the site of the sale, observing that the jury "necessarily would have had to employ conjecture" to reach that conclusion. *Id*. at 246-247.

CRIMES: FIREARM, CARRYING, ANTIQUE GUN

In *Commonwealth v. Bibby*, 54 Mass. App. Ct. 158 (2002), the defendant, charged under G.L. c. 269, § 10(a), with carrying a firearm (or, more precisely, with having it in his possession while not "in or on his residence or place of business"), elicited on cross-examination that the prosecution's ballistics expert did not know whether the gun in question was manufactured before 1899. The defendant asked the judge to instruct the jury that a gun manufactured before 1899 could not be a "firearm." In doing so, he relied on G.L. c. 140, § 121, which exempts such antique guns from the definition of "firearm." The Appeals Court holds that the trial judge correctly denied the requested instruction because the exemption in § 121 is expressly limited to the use of the term "firearm" in G.L. c. 140, §§ 122 to 129D and 131, 131A, 131B, and 131E. (The Court seems to ignore the fact that G.L. c. 140 , § 131, [which *is* mentioned in § 121] is the statute that authorizes the issuance of licenses to carry firearms. The problem with the Court's analysis is that G.L. c. 269, §

10(a) and (c) essentially incorporate the licensing requirements of G.L. c. 140, § 131 and 129C, respectively, and make failure to comply with those sections a crime. It makes no sense to punish a defendant for failure to obtain a license to carry or an F.I.D. card for a gun that does not qualify as a "firearm" for the purpose of such licenses or cards.)

CRIMES: FIREARM: POSSESSION, KNOWLEDGE OF DEFACED SERIAL NUMBER, SCOPE OF LICENSE EXCEPTION FOR ONE'S "RESIDENCE"

In *Commonwealth v. Moore*, 54 Mass. App. Ct. 334 (2002), summarized at Search and Seizure: Warrantless Search: Exigent Circumstances, Search of Apartment from Which Shots Fired, both defendants were convicted, inter alia, of one count of receiving or possessing a firearm with the serial number defaced, and two counts of possession of a firearm. The defendant Moore's firearm possession convictions were under G.L. c. 269, § 10(a), which applies when the gun possession is unlicensed and not at the defendant's "residence or place of business." The Appeals Court finds sufficient evidence of the defendant's constructive possession of the two weapons in the smell of gunpowder, the very recent reports of gunshots, the shell casings, the defendants' proximity to the guns, their "muffled voices," and the "thud" (presumably, the sound of the gun or the duffle bag containing the other gun hitting the floor). *Id*. at 341-342. (The Court does not explain how the evidence justified a conclusion beyond a reasonable doubt that each defendant possessed both guns, rather than each possessing only his own.) The Court also finds sufficient evidence that the defendants were aware of the defaced serial number on the Tech-Nine. To do so, the Court looks no further than the language of G.L. c. 269, § 11C, which provides that "possession or control of a firearm" with a defaced serial number is "prima facie evidence that the person having such possession or control is guilty of a violation of this section; but such prima facie evidence may be rebutted by evidence that such person had no knowledge whatever that such number had been removed . . , or by evidence that he had no guilty knowledge thereof." The Court declines to limit this presumption to cases of actual, rather than constructive, possession. *Id*. at 342-343. The Court also finds the evidence sufficient to warrant a finding that the defendant Moore was not in his own residence when he possessed the guns, since the man who answered the door told the police that he rented or controlled the apartment and that the people in the back bedroom (which included Moore) were his "friends," thus "suggesting that they were not roommates or cotenants." *Id*. at 342. However, Moore's convictions under § 10(a) were not allowed to stand because of an error in the judge's instruction on the extent of one's "residence." Moore testified that he moved into the apartment the day before his arrest and that he had free access to all of the rooms in the apartment, including the back bedroom which, although it was not his room, contained the only telephone in the apartment. In response to a question, the judge told the jury that "[a] person's residence or place of business does not include common areas of an apartment . . . , but only areas that are under that person's exclusive control." As the Court explains, however, the "exclusive control" limitation applies only to areas outside the defendant's apartment or home, such as halls, stairways, foyers, or outside yards. Here, the judge's instructions could have been interpreted by the jury as establishing that the defendant was not in his "residence" merely because he shared the apartment with others. A more appropriate instruction is suggested by the Court: "[T]he Commonwealth has the burden of proving that the defendant was not within his residence or place of business when he possessed the gun; whether the Commonwealth has proven that the defendant was not within his residence is a question of fact for you to determine; in a dwelling with multiple units, a residence may be the entire unit if the person dwelling therein is not excluded from any part thereof and has access to all the rooms; a common area is an area outside the residence to which all of the tenants in a building have access and the landlord maintains control; an area outside of the residence will still fall within the exemption if it is an area over which the defendant maintains exclusive control alone or with other members of the residence." *Id*. at 346.

CRIMES: HABITUAL OFFENDER, PRIOR FEDERAL CONVICTIONS

Under G.L. c. 279, § 25, a defendant convicted of a felony may be sentenced as an habitual offender if he has twice before been "convicted of crime and sentenced and committed to prison *in this or another state* . . . for terms of not less than three years each." Habitual offenders receive as a sentence the maximum term for the new felony of which they are convicted, *id*., and they are eligible for parole after serving half of that term or, in the case of a life felony, fifteen years. G.L. c. 127, § 133B. In *Youngworth v. Commonwealth*, 436 Mass. 608 (2002), the Supreme Judicial Court holds that the defendant's conviction in a North Carolina *federal* court is not a conviction "in this or another state," within the meaning of G.L. c. 279, § 25. Since the defendant had only one other qualifying conviction, dismissal of the habitual offender charge against him was required. In reaching this result, the Court rejects the prosecution's facially appealing arguments that the word "in" in the statute "merely connotes geographic location, not jurisdiction," and that any ambiguity should be resolved "by reference to [the statute's] history and purpose." *Id*. at 612. The Court considers itself "bound by two fundamental principles of statutory construction: (1) criminal statutes are strictly construed against the Commonwealth, and (2) any plausible ambiguity must be resolved in favor of the defendant." *Id*. at 611. The Court also notes that "[t]he infancy of Federal criminal law in 1904, when the statute was last amended, . . . suggests that the Legislature most likely did not give any consideration to the use of Federal convictions." *Id*. at 612.

CRIMES: KIDNAPPING, NO SPECIFIC INTENT REQUIRED

The defendant and the complainant had dated, off and on, for three years. On the night in question, they checked into a motel. Soon after, the complainant, sick from alcohol they had imbibed earlier at a restaurant, said she wanted to go home. The defendant told her they had to stay because his friends were coming. The friends arrived and began drinking with the defendant. The complainant persisted in her desire to leave. The defendant locked the door to the room and blocked it with a chair braced under the doorknob. (It is unclear whether he did so to keep the complainant in or others out.) When the complainant called a friend, the defendant unplugged the phone, struck her in the face, and put a gun to her head, saying that he would kill her if she called the police. The complainant nonetheless succeeded in calling her friend again and acquiesced in the friend's offer to summon the police to the motel room. The defendant interrupted the call by ripping the phone from the wall. His friends, hearing that the police were on their way, left. The complainant, however, not wishing to leave with the defendant, lied to him, saying that the police were not coming. She and the defendant remained in the room and had intercourse. When the police arrived, the defendant was arrested for kidnapping. *Commonwealth v. Bibby*, 54 Mass. App. Ct. 158 (2002). On appeal, the defendant argued that the kidnapping statute, G.L. c. 265, § 26, requires proof of a specific intent. The statute reads as follows: "Whoever, without lawful authority, [1] forcibly or secretly confines or imprisons another person within this commonwealth against his will, or [2] forcibly carries or sends such person out of this commonwealth, or [3] forcibly seizes and confines or inveigles or kidnaps another person, *with intent either to cause him to be secretly confined or imprisoned in this commonwealth against his will, or to cause him to be sent out of this commonwealth against his will or in any way held to service against his will*. . . ." [Bracketed numbers supplied] Although the italicized language seems capable of modifying all three forms of kidnapping, the Court concludes that it modifies only the third. In explaining this conclusion, the Court recites that previous "authorities unequivocally [so] hold." *Id*. at 161. Those who take the time to read the cited authorities will find, starting with a concession of the possibility of this interpretation for the sake of argument in *Commonwealth v. Ware*, 375 Mass. 118, 119-120 (1975), they move in steps to the adoption of the interpretation without ever providing (or even exploring) any reason for concluding that the statute should be so interpreted. In any event, the Court here concludes that the trial judge correctly refused to charge the jury on a specific intent requirement, and that the evidence was sufficient to sustain the defendant's conviction, under the first clause of the statute.

CRIMES: LARCENY, APPROPRIATENESS OF CHARGING MULTIPLE THEFTS AS LARCENOUS SCHEME, PROOF OF OWNER OF PROPERTY UNNECESSARY

See *Commonwealth v. Pimental,* 54 Mass. App. Ct. 325 (2002), summarized at Jury Instructions: Specific Unanimity, Theory Not Supported by Evidence, for a discussion of problems which may arise when multiple thefts are charged as a single offense. It is appropriate (but not required) to charge multiple thefts in a single complaint or indictment "when it appears that successive takings are actuated by a single, continuing criminal intent or pursuant to the execution of a general larcenous scheme." *Id*. at 329. Also, as the Court explains in *Pimental*, the "property of another" language in the larceny statute, G.L. c.266, § 30, does not require proof of the actual owner of the stolen property. It is enough for the prosecution to establish that the defendant was not the owner. *Id*. at 328.

CRIMES: LARCENY: FAILURE TO REPORT EARNINGS WHICH WOULD RESULT IN PENSION PAYBACK

The defendant, a former Boston police officer retired on a disability pension, operated a private investigation business. His disability pension was paid monthly. At the end of each year, pensioners are required to report their earnings for the year. If the earnings exceed a certain amount, any money in excess of that amount must be repaid by the pensioner or else it is withheld from future monthly checks as they accrue. The defendant underreported his earnings and thus avoided his obligation to make repayment. He was consequently charged with three counts of larceny and convicted on all three. The Appeals Court reversed the convictions, ruling that he was entitled to a required finding. *Commonwealth v. Mills*, 51 Mass. App. Ct. 366 (2001). Further appellate review was granted. The Supreme Judicial Court now finds that the trial judge properly denied the defendant's required finding motion, but the convictions must nonetheless be reversed and the case remanded because of omissions in the jury instructions. *Commonwealth v. Mills*, 436 Mass. 387 (2002). The indictments charging the defendant with *stealing* property. The word "steal" includes each of the three technically distinct crimes punishable under G.L.c. 266, § 30: larceny, embezzlement, and obtaining by false pretenses. The trial judge charged the jury only on larceny. The Supreme Judicial Court agrees with the Appeals Court that filing the false earning reports did not amount to an "unlawful taking and carrying away" of money, and that the "release of a claim to money" which resulted from the defendant's actions was not "personal property" within the meaning of the law of larceny. *Id*. at 394. Nor did the defendant's actions constitute embezzlement, since embezzlement requires proof that the defendant obtained control of the property by virtue of a position of "trust or confidence," and the defendant here received the

money in question as a government benefit to which he was entitled, rather than as a consignment by virtue of a position of "trust or confidence." *Id*. at 394-396. However, the Court concludes that the evidence did make out a case of larceny by false pretenses, since the defendant received payments to which he was not entitled by making false statements about his earnings, intending that the pension board would rely on those statements and consequently continue to pay him his full pension amount, rather than deducting refund amounts for the previous year. *Id*. at 396-397. In reversing the defendant's conviction, the Court does not refer, as one might expect, to the principle that a conviction cannot stand if the jurors were charged on a legal theory of the crime (here, traditional larceny) which was not supported by the evidence. See *Commonwealth v. Plunkett*, 422 Mass. 634, 638 (1996). Instead, the Court talks about the judge's failure to instruct the jurors fully on the elements of the offense charged, namely larceny by false pretenses. *Id*. at 398-399. This analysis seems to ignore the principle, on which the Appeals Court relied, 51 Mass. App. Ct. at 373 n.11, that a verdict should not be upheld on a basis not put forth by the parties or the trial judge. Although the Court remands the case for a new trial, it seems to recognize that, as the Appeals Court pointed out, *id*., double jeopardy principles may bar the retrial. *Id.* at 399 n.7.

CRIMES: LARCENY: TENANT'S REMOVAL OF ALLEGED FIXTURES

The complainant purchased a house at a foreclosure sale. The defendant, who lived there at the time of the sale, declined to enter into a tenancy with the complainant and was evicted. When he left, he took with him items from the house, including a parlor gas stove, glass shower doors, a medicine cabinet, a vanity, ceiling lights and fans, and a dishwasher. The removal of these items left holes in the walls, exposed wires, and exposed pipes. The Appeals Court holds that the defendant's motion for a required finding of not guilty on the charge of larceny should have been allowed. *Commonwealth v. Bundza*, 54 Mass. App. Ct. 76 (2002). "There is no legal presumption of ownership of personal property that has allegedly been affixed to real estate," and the prosecution failed to produce the necessary proof that the property here did not belong to the defendant (whose tenancy predated the complainant's ownership of the house). Considerations in determining ownership of alleged fixtures include whether the items can be removed without material injury to the premises, whether the items would lose their essential character or value if removed, and, most importantly, the intent of the owner of the items upon installation. The prosecution's proof left it no less likely that the defendant owned the property at issue than that the complainant owned it.

CRIMES: MANSLAUGHTER, INVOLUNTARY: FAILURE TO NOTIFY FIRE DEPARTMENT OF FIRE ONE ACCIDENTALLY STARTS

The tragic death of six Worcester firefighters in a warehouse fire has led the Supreme Judicial Court to expand the reach of the crime of involuntary manslaughter in *Commonwealth v. Levesque*, 436 Mass. 443 (2002). The defendants, a homeless couple, were living in an abandoned factory warehouse. A fire started when a lit candle was knocked over during a scuffle between them. Their efforts to put out the fire failed, and they fled the building. Although they had a cell phone and also passed several open business establishments as they left the scene, they did not notify the fire department of the fire. A superior court judge had allowed the defendants' *McCarthy* motion, but the Supreme Judicial Court reverses and reinstates the six involuntary manslaughter indictments. "Involuntary manslaughter is 'an unlawful homicide, unintentionally caused . . . by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct.'" *Id*. at 448, quoting *Commonwealth v. Catalina*, 407 Mass. 779, 783 (1990). An omission to act, instead of an affirmative act, may form the basis for manslaughter only if the defendant had a duty to act. In *Levesque*, the Court concludes, borrowing from the civil law of torts, that, "where one's actions create a life-threatening risk to another, there is a duty to take reasonable steps to alleviate the risk," and that the wanton or reckless failure to fulfil this duty may constitute manslaughter. 436 Mass. at 450. "Wanton or reckless" conduct is "intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another;" the likelihood of such harm "must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or of his failure reasonably to recognize it." *Id*. at 451-452, quoting *Commonwealth v. Welanski*, 316 Mass. 383, 399 (1944), and *Commonwealth v. Sandler*, 419 Mass. 334, 336 (1995). The intentional conduct alleged here was not the setting of the fire, but the failure to promptly report it. The grand jury could have concluded that the defendants had the ability to report the fire and that they knew or should have known that the choice not to do so would create a grave risk of harm. The motion judge had questioned the foreseeability of the harm since fire fighters do not ordinarily die fighting fires. However, the Court disagrees, observing that "an uncontrolled fire is inherently deadly to all who may come into contact with it, whether fire fighters or ordinary citizens." 436 Mass. at 453. The Court also concludes that there was sufficient evidence to satisfy the *McCarthy* probable cause standard on the question of whether the failure to promptly report the fire was the "efficient cause" of the firefighters' deaths, since it is common knowledge that "a fire spreads and becomes more dangerous the longer it is left unattended." *Id*. at 454.

CRIMES: MOTOR VEHICLES: LEAVING SCENE OF ACCIDENT CAUSING DEATH, "INTENT TO AVOID PROSECUTION OR EVADE APPREHENSION"

At 9:00 on a Saturday night, after drinking at least four cans of beer on an empty stomach in the past three hours, the defendant was driving home. He knew the speed limit to be thirty miles per hour, but the road was under construction with rough pavement, exposed manhole lids, and barrels. It was also a very dark, moonless night, and the road was poorly lit. As he drove along at a speed somewhere between 45 and 56 miles per hour, he veered into the oncoming lane and struck from behind a teenage boy who was riding a bicycle with two friends. The boy's body shattered the defendant's windshield and then bounced against the curb. Instead of stopping, the defendant drove on, passing numerous homes and businesses that had telephones. Unable to see through the shattered windshield, he had to stick his out the window to see the road. He arrived home six minutes after the accident. Twelve minutes later, prodded by his wife, he called the police to report his involvement in the accident. The boy died, and the defendant was convicted of leaving the scene of an accident causing death, G.L. c. 90, § 24(2)(a ½)(2). *Commonwealth v. Henault*, 54 Mass. App. Ct. 8 (2002). On appeal, the defendant argued that the evidence was insufficient to prove that he had the requisite intent "to avoid prosecution or evade apprehension" when he left the scene. The Court has no difficulty rejecting this argument, observing that there was ample evidence to justify a jury conclusion that the defendant had feared prosecution for driving under the influence and driving to endanger, causing serious injury. Although he ultimately called the police, the crime "was complete when he fled with the permissibly inferred intent to avoid identification and law enforcement." *Id*. at 16 n.10. Although not pertinent to the facts of this case, the Court notes that the statute would not have been violated "if the defendant had . . . left to find a telephone and [had] immediately called the police and [given] the necessary information." *Id*. at 15, quoting *Commonwealth v. Donohue*, 41 Mass. App. Ct. 91, 94 (1996).

CRIMES: MOTOR VEHICLES: OPERATING UNDER THE INFLUENCE, SUFFICIENCY OF EVIDENCE

At 12:51p.m., a Wakefield police officer saw the defendant unsteadily walk to his car and try without success to insert the key in the ignition. The defendant was unquestionably intoxicated. However, because of his failure to succeed in inserting the key in the ignition, the defendant never "operated" the car within sight of the officer. His conviction on the operating under the influence charge which was subsequently brought against him thus required proof that he had been intoxicated when he parked the car where the officer first saw it. To supply this proof, the prosecution offered testimony of the defendant's wife that, after speaking with the defendant by telephone at 11:20 a.m., she became concerned that something was wrong because he was very angry. The defendant's daughter-in-law testified that she had spoken with him by telephone at 11:00 a.m. and that he was abusive to her, leaving her with a "funny feeling," based on past experience, that he had been drinking. Sometime between 12:20p.m. and 12:30p.m., the daughter-in-law saw the defendant pull into the driveway of their home, stopping abruptly. He stepped out of the car for a moment, then reentered and drove off, digging up the lawn in the process and driving too fast, but otherwise driving "fine." The Appeals Court finds this evidence, together with a half empty vodka bottle discovered in the car, sufficient to warrant a jury finding that "the defendant's consumption of alcohol diminished his ability to operate a motor vehicle safely" by the time he drove the car to where the officer encountered him. *Commonwealth v. Orben*, 53 Mass. App. Ct. 700, 705 (2002). Inexplicably, the Court announces that the wife's unobjected testimony about her "concern[] that something was wrong," based on the defendant's change of mood, "essentially, constituted lay opinion that the defendant was intoxicated," although the wife said absolutely nothing relating the mood change to consumption of alcohol. The Court also equates the daughter-in-law's unobjected testimony that, after her phone conversation with the defendant, she had "a funny feeling he's been drinking" with an admissible lay opinion as to intoxication, rather than mere suspicion or conjecture. (One suspects that the Court's view of the case may have been colored by the fact that the defendant had more than twenty previous convictions for driving under the influence.)

CRIMES: ROBBERY, ARMED: UNSEEN GUN

Evidence before the grand jury established that the defendant walked into a Store 24 and demanded money of the clerk. When the clerk refused, the defendant said, "I have a gun." The clerk never saw the gun, but the defendant left the store with $150.00. She drove off in a car. Soon thereafter, police officers located the getaway car parked nearby. The defendant, the registered owner of the car, was arrested on the street a short time later and identified as the robber by the store clerk. She had neither cash nor a gun on her person when arrested. A superior court judge allowed the defendant's *McCarthy* motion and dismissed the armed robbery indictment, concluding that there was insufficient evidence to justify its issuance. The Appeals Court reverses and reinstates the indictment. *Commonwealth v. Simpson*, 54 Mass. App. Ct. 477 (2002). To withstand a *McCarthy* motion, the evidence before the grand jury must supply "reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the defendant . . . committed" the offense. *Id*., at 479, quoting *Commonwealth v. O'Dell*, 392 Mass. 445, 450 (1984). The only issue on appeal was whether the evidence sufficiently warranted an inference that the defendant was actually armed with a gun. The Court concludes that the

defendant's assertion that she had a gun was sufficient evidence in that regard, and that it was for the petit jury to determine after trial whether she actually did.

PRACTICE TIP: The result in *Simpson* flows inevitably from *Commonwealth v. Delgado*, 367 Mass. 432, 434 (1975), where the Supreme Judicial Court held similar evidence sufficient to pass the more stringent test for withstanding a required finding motion. The law with respect to "armed" robbery is relatively clear: The robber must have in her possession during the robbery some object which is either an inherently dangerous weapon or at least reasonably appears, from the perspective of the victim, to be capable of inflicting bodily harm (such as a toy gun or one that is not loaded). An assertion by the robber that she does have a gun or other weapon (including a finger in the victim's back or in the robber's pocket pointed like a gun) is sufficient to get the armed robbery charge to the jury. However, in order to convict, the jurors must be convinced beyond a reasonable doubt that the robber actually possessed an inherently or apparently dangerous weapon, not merely that the defendant purported to have one. *Commonwealth v. Jackson*, 419 Mass. 716, 722-725 (1995); *Commonwealth v. Howard*, 386 Mass. 607, 608-611 (1982). See also, *Commonwealth v. Colon*, 52 Mass. App. Ct. 725, 727-729 (2001).

CRIMES: THREAT TO MURDER

The juvenile defendant, a ninth grade student, was overheard saying to two friends at school, "Oh, those dumb blondes, you know, they have to go too." The same eavesdropper, a fellow student of the juvenile, had previously overheard him making comments about "blow[ing] up the jocks" with a bomb at a football game, and going to even-numbered classrooms at the school and "gun[ning] them down like little dominos." The eavesdropper told Tara, a fourteen-year-old blonde classmate, about these comments. Tara "freaked out" and became afraid that the juvenile defendant (whom she apparently did not know and had never spoken to) was going to hurt her. She reported this to a police officer assigned to the school, and the defendant was subsequently charged and adjudicated delinquent for threatening to murder her, in violation of G.L. c. 275, § 2. *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520 (2002). The Appeals Court injects a bit of sanity in this series of events and reverses the delinquency adjudication, finding that the prosecution's proof fell short in two respects: First, the "threat" was not shown to have been communicated to the complainant, Tara. The Court finds implicit in the case law a requirement that the threat be communicated in some manner to its purported target. While the communication may be accomplished through an intermediary, rather than directly, in such cases the prosecution "must prove . . . that the defendant intended to communicate the threat to the third party who acts as intermediary" — an "onerous [task] where the third party intermediary is also an eavesdropper." *Id*. at 526-527. Here, neither the words of the remark, the manner in which it was spoken, nor anything else in the evidence warranted a conclusion that the defendant intended it to be heard by anyone other than the friends to whom he said it. Nor did the broad reference to "dumb blondes" suggest Tara in particular as its target so that one hearing the remark would be likely to pass it on to her. Second, "they have to go too" was not, standing alone, sufficient "expression of an intention to inflict evil, injury, or damage" to constitute a "threat" against "dumb blondes." *Id*. at 528. While the Court is willing to consider the "attending circumstances" of a remark, "such as demeanor, prior behavior, and statements," to determine if the remark rises to the level of a threat, the Court considers the connection with the other more specific comments made by the defendant about other groups on other days too attenuated to remedy the vagueness of the "dumb blonde" remark. *Id*. at 529-530.

DEFENSES: SELF-DEFENSE, ENTITLEMENT TO INSTRUCTION

In yet another in a long line of recent cases, the Appeals Court continues a disturbing trend of upholding the denial of a self-defense instruction where, in its view, the evidence was insufficient to warrant such an instruction. *Commonwealth v. Williams*, 53 Mass. App. Ct. 719 (2002). Following a fracas with his pregnant girlfriend on a bus, the defendant fled. He was intercepted by a uniformed police officer who tried to stop him. A passing off-duty officer came to the aid of the first officer and, following a struggle, subdued the defendant. Convicted of resisting arrest and assault and battery on both officers, as well as his girlfriend, the defendant argued on appeal that the trial judge erred when he refused to give a self-defense instruction with respect to the assault on the off-duty officer. The Appeals Court holds that the defendant was not entitled to the instruction because there was insufficient evidence that he tried to avoid combat. In so ruling, the Court credits the officer's "uncontroverted" testimony that, as the defendant ran directly toward him, he told the defendant he was a police officer and to stop; that the defendant responded by saying he did not care and trying to push his way past the officer; and that the officer grabbed the defendant, who then threw him against a car. After paying lip service to the maxim that, "if any view of the evidence would provide support for [self-defense], a defendant is entitled to such an instruction," *id*. at 721, the Court goes on to remark, "That other witnesses did not confirm these details does not mean that [the off-duty officer's] testimony concerning the defendant's aggressive behavior could not be credited." ***Id.*** at 722.

PRACTICE TIP: This and other recent cases (see, in particular, *Commonwealth v. Pike*, 428 Mass. 393 [1998]) invite trial judges to substitute their own view for that of the jury on self-defense issues. The harm flowing from the judge's conclusion that evidence on one of the elements of self-defense is absent does not necessarily stop at the mere denial of the instruction. The judge may also specifically admonish the jury that self-defense is *not* an issue in the case, *Commonwealth v. Reed*, 427 Mass. 100, 103 (1998), and bar counsel from mentioning self-defense to the jury. See *Williams*, 53 Mass. App. Ct. at 725-726. To avoid being placed in the difficult position of having to devise a closing argument when there is no question that your client struck the alleged victim and the trial judge has barred you from arguing self-defense, pay careful attention to the elements of the defense. In the case of non-deadly force, the necessary foundation is "reasonable apprehension by the defendant that he (1) is in danger of personal harm; (2) can avoid that harm only by resort to force; (3) attempted to avoid physical combat or was unable to do so before resorting to force; and (4) used only the force necessary in the circumstances." *Commonwealth v. Alebord*, 49 Mass. App. Ct. 915, 915-916 (2000). In the case of "deadly force," the required foundation is "evidence warranting at least a reasonable doubt that the defendant: (1) had reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force, (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and (3) used no more force than was reasonably necessary in all the circumstances of the case." *Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980).. Whenever it is reasonable to do so, request an instruction on non-deadly force, even though an allegedly dangerous weapon is involved. It is, after all, for the jury to determine whether the weapon, such as a shod foot, a stick, etc. is a "deadly" one. Also, bear in mind that, although some opinions suggest that force is deadly whenever a dangerous weapon is involved (see, for example, *Commonwealth v. Pike, supra*, 428 Mass. at 395-396), the force may not be deadly if it is only threatened (e.g., a shot in the air or a knife or gun merely pointed at the alleged victim), rather than actually used. See *Commonwealth v. Cataldo*, 423 Mass. 318, 322-326 (1996); *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 248 (1999); *Commonwealth v. Hubbard*, 45 Mass. App. Ct. 277, 282 (1998). The *Williams* opinion suggests that it will be difficult for a defendant to sufficiently raise a claim of self-defense through mere cross-examination of prosecution witnesses and that he may have to testify or present his own witnesses in order to support such a claim sufficiently to be entitled to a jury instruction.

DISCOVERY: DELAY IN PROVIDING NOTICE OF WITNESS, REMEDY

Four days before trial, the prosecution sprung a new witness on the defense. Defense counsel moved for a sixty-day continuance or, in the alternative, to exclude the witness's testimony. Instead, the judge found that the late disclosure was a good faith mistake and ordered either a voir dire of the witness or an interview of her by defense counsel, whichever counsel might prefer. At the voir dire which was held, information casting doubt on the witness's credibility emerged. (The witness claimed that, although she now knew very little Spanish, she understood it well enough two years before to understand incriminating statements made by the defendant in Spanish in a conversation that she overheard.) After the voir dire, defense counsel's renewed motion to exclude the witness's testimony – this time, as being unreliable – was denied. On appeal, the defendant argued that the judge should have excluded the testimony or granted the motion to continue because the delay in disclosure left him unable to test the witness's Spanish-speaking ability at an earlier date and a continuance would at least have given him the opportunity to find witnesses with knowledge of the matter. The Supreme Judicial Court rules otherwise, pointing out that the defendant's "claim of prejudice is undercut . . . by his failure, after the voir dire hearing, to renew his motion for a continuance." *Commonwealth v. Marrero*, 436 Mass. 488, 496-497 (2002).

PRACTICE TIP: The lesson here probably goes without saying, but will be mentioned anyway. Renew your objection or request for relief after any event that might be viewed by an appellate court as dissipating the prejudice from the matter raised in your original objection.

DISCOVERY: EXPERT TESTIMONY, CHANGES IN TESTIMONY OF PROSECUTION WITNESSES, POLICE OFFICERS' NOTES

In *Commonwealth v. Garrey*, 436 Mass. 422, 439-442 (2002), the defendant gains no relief for several discovery violations by the prosecution, but the Court's opinion provides support for defense motions for access to police officer notes and notice of the substance of the prosecution's expert testimony. According to the Court, the trial judge should not have admitted "blood spatter" testimony by a prosecution serologist where the conference report required disclosure of every expert opinion to be produced at trial, and the prosecution failed to advise the defense of its serologist's opinion. "The defendant was entitled to notice that the serologist would give an opinion as to blood spatter." *Id*. at 440. The Court also implies that the defendant was entitled to notice of a pathologist's opinion – not included in his report – that the victim had a wound consistent with a "defensive wound." *Id*. at 441. The Court also strongly disapproves of the

prosecution's erroneous assertion, at a hearing on "turn[ing] over handwritten notes of police officers taken in connection with witness statements," that no such notes existed. *Id*. at 441. No relief was granted for any of these discovery violations because of the absence of a showing of prejudice. However, the Court emphasizes that "[t]he prosecutor has an affirmative obligation diligently to search for and preserve materials that are discoverable in every criminal case. A lackadaisical attitude with regard to this responsibility is unacceptable in any criminal prosecution, and most emphatically so in a prosecution for murder." *Id*. at 442 n.12. The Court is less demanding with respect to notifying the defense of changes in the anticipated testimony of prosecution witnesses. The defense must show that the prosecutor foresaw the changes and that they were material. "To require the Commonwealth to predict every minor variance in testimony would create an unreasonable burden." *Id*. at 440.

DISCOVERY: INTERNAL AFFAIRS INVESTIGATION RECORDS, FREEDOM OF INFORMATION ACT REQUEST

A Worcester newspaper made a request under the Freedom of Information Act, G.L. c. 66, §10, for the records of a police internal affairs investigation into a claim of police brutality. The investigation had absolved the officer of any blame. The police chief's position that the records were exempt from disclosure was rejected by the supervisor of public records, and disclosure (with certain identifying information deleted) was ordered. When the police chief failed to comply with the order, the newspaper filed a superior court action in the nature of certiorari to compel compliance. In that action, the chief claimed that all of the records in question fell within the public records exception for personnel files, G.L. c.4, § 7, Twenty-sixth (*c*). The judge granted a motion by the newspaper to permit its attorney to examine the records, subject to a detailed protective order, for the limited purpose of testing the claim that the records fell within the exception. The chief was allowed to pursue an interlocutory appeal, and the Supreme Judicial Court holds that the judge's order was proper. *Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester*, 436 Mass. 378 (2002). According to the Court, it would be "wholly inconsistent with the purpose of G.L. c. 66, § 10," to "[a]llow[] the defendants to decide unilaterally, without any oversight, wh[ich] documents are subject to disclosure" and which are exempt." 436 Mass. at 385. An order such as that issued by the judge is one of several proper ways to achieve review of a disputed exemption claim. (Other options are an in camera inspection by the judge or preparation of "an itemized and indexed document log in which the custodian sets forth detailed justification for its claims of exemption," which opposing counsel may then review and respond to, thereby narrowing the focus of the dispute.)

DOUBLE JEOPARDY: DUPLICATIVE CONVICTIONS

In *Commonwealth v. Maynard* 436 Mass. 558, 566-568 (2002), summarized at Murder: Sufficiency of Evidence, the defendant was convicted of kidnapping the victim, as well as murdering him. On appeal, he argued that his acts of restraining the victim while he was beating or assaulting him could not support the kidnapping conviction because they were merged in the murder conviction. The Court rejects this contention, saying: "[W]e are unwilling to adopt a rule that requires the treatment of confinement or asportation used as a means to facilitate the commission of such crimes as merged in the substantive crime." *Id*. at 568, quoting *Commonwealth v. Rivera*, 397 Mass. 244, 254 (1986).

DOUBLE JEOPARDY: DUPLICATIVE CONVICTIONS

In *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785, 792-793 (2002), summarized at Evidence: Hearsay: Statement against Penal Interest Exception, the defendant was convicted of both arson of a dwelling, G.L. c. 266, § 1, and burning insured property with the intent to defraud, G.L. c.266, § 10. These convictions were not duplicative of each other because each required elements not required for the other. The former charge required proof that a *dwelling* was burned, and the latter required proof that the burned property was insured and that the defendant had a specific intent to defraud.

DOUBLE JEOPARDY: DUPLICATIVE CONVICTIONS

The defendant was charged with firing a single gunshot from a moving car into another moving car occupied by four young men. He had just had a fight with one of the four, and it was reasonable to assume that the man with whom he fought was the intended target of the gunshot. None of the four was struck by the bullet, but the defendant was charged with, and convicted of, four counts of assault by means of a dangerous weapon – one count for each occupant of the car. Although given the option of a verdict based on the "immediately threatened battery" form of assault, the jurors instead returned four verdicts of guilty on the "attempted battery" form. The Appeals Court affirmed the four convictions, *Commonwealth v. Melton*, 50 Mass. App. Ct. 637 (2001). The Supreme Judicial Court granted the defendant's request for further appellate review, but affirms the four convictions. *Commonwealth v. Melton*, 436 Mass. 291 (2002). It is well established that the appropriate "unit of prosecution" for assaultive crimes is the person assaulted. The defendant argued, however, that "his intent cannot have exceeded what the laws of physics would permit [a] single shot to accomplish," and that three of his convictions should be dismissed as duplicative. *Id*. at 295. The Court, however, retorts that "[a] person

can intend things that are hopelessly unrealistic," and that the impossibility of the result is merely an argument to be made to the jurors to persuade them that the defendant did not harbor the requisite intent. *Id*. at 295-296. The Court invokes the doctrine of "transferred intent" – a doctrine that has heretofore been confined in Massachusetts to cases in which an actual battery resulted – to justify the four convictions. The defendant's intent to hit the target individual supplied the necessary intent with respect to the other three individuals as well. The fact that the judge did not instruct the jury on transferred intent is seen by the Court as an omission which could only help the defendant by making it more difficult for the jury to find the requisite intent. *Id*. at 299 n.11. (It is unclear why the Court did not view this omission as establishing "the law of the case" and thereby foreclosing the vindication of the verdicts on a ground not raised by the parties or put before the jury. See *Commonwealth v. Thomas*, 400 Mass. 676, 681-682 [1987].) In the Court's view, the multiple convictions are consistent with the purpose underlying the common law of assault. "An attempted but unsuccessful battery is criminal not because it actually harms the victim . . . but rather because it imperils the victim." *Id*. at 299. Since all four occupants of the car were imperiled by the shot, and the unit of prosecution is the person imperiled, four counts of assault were appropriate. Although the Court points out that the gunshot likely instilled equal fear in all four occupants, such fear is not an element of this form of assault, and the jury, although given the opportunity, failed to find the defendant guilty of the form of assault based on intentionally instilling fear. The bottom line of the Court's opinion is that "a person is a victim of assault if he is at risk of battery from the defendant's attempted battery on anyone." *Id*. at 300.

PRACTICE TIP: The potential repercussions of this decision are enormous. It appears that anyone in the vicinity of a shooting may be the victim of an assault with a dangerous weapon, as long as they are "imperiled" by the gunshot. In *Melton* itself, under the Court's reasoning, the other three occupants of the car would be victims of an assault by means of a dangerous weapon even if the bullet had hit its intended target. An approach to limiting the scope of the opinion may be to factually distinguish it. The shot in *Melton* was fired "into a car full of people . . . from a passing vehicle traveling at high speed," *id*. at 299, and the identity of the intended target was not entirely clear.

EVIDENCE: EXPERT TESTIMONY: ARSON, CAUSE OF FIRE: ADMISSIBILITY

In *Commonwealth v. Goodman*, 54 Mass. App. Ct. 385 (2002), the defendants were charged with setting fire to a dry cleaning establishment which they owned. An expert witness testified for the prosecution as to the cause of the fire. The expert, whose experience and credentials were unchallenged, explained that he first examined the exterior of the building for external causes and found none. He then went inside where, by proceeding from the least damaged areas to the most damaged, he determined the fire's path and area of origin. Within the area of origin, a burn pattern allowed him to locate the point of origin. There were no electrical or other apparent causes for the fire at the point of origin, and the expert therefore concluded that the fire was deliberately set. On appeal, the defendants argued that the prosecution failed to establish a foundation that the underlying scientific theory behind its expert's testimony was generally accepted within the relevant scientific community or that the theory was otherwise proven reliable, as required by *Commonwealth v. Lanigan*, 419 Mass. 19, 25-26 (1994). While acknowledging that the evidence presented about the general acceptance of the methodology employed by the arson expert was sparse, the Court finds the prosecution's foundation adequate: "[I]n matters which, as in this case, depend so heavily on common sense observations, not on a hypothesis for explaining phenomena as in esoteric scientific theory, the judge can properly look to his own common sense, as well as the depth and quality of the proffered expert's education, training, experience, and appearance in other courts, as relevant both to the expert's reliability and to the helpfulness to the jury of that expert's opinion — the touchstones of the inquiry."

EVIDENCE: HEARSAY: DYING DECLARATION EXCEPTION

In *Commonwealth v. Moses*, 436 Mass. 598, 601-603 (2002), summarized at Murder: Extreme Atrocity or Cruelty: Sufficiency of Evidence, Constitutionality, the victim, shot four times (twice in the chest), was grimacing in pain and asking for oxygen. When he asked an EMT if he was going to die, she replied that "it didn't look good." The trial judge properly admitted the victim's statement identifying the defendant as his shooter under the dying declaration exception, even though he at first responded to treatment and did not die until the following day. The judge erred in refusing to let defense counsel introduce the victim's prior convictions to impeach his credibility, as permitted by Proposed Mass. R. Evid. 806, but the error was harmless.

EVIDENCE: HEARSAY: GRAND JURY TESTIMONY, ADMITTED AS SUBSTANTIVE PROOF

In both *Commonwealth v. Clements*, 436 Mass. 190 (2002), and *Commonwealth v. Carrasquillo*, 54 Mass. App. Ct. 363 (2002), the victim of, or a witness to, a shooting initially identified the defendant as the shooter and persisted in this identification in testimony before the grand jury, but rescinded the identification at trial. In both cases, the court holds that the grand jury testimony was properly admitted as substantive evidence and that it was sufficiently corroborated to sustain the defendant's conviction under *Commonwealth v. Daye*, 393 Mass. 55 (1984). In *Clements*, 436 Mass. at 192,

the Supreme Judicial Court summarizes the necessary foundation for admitting substantively grand jury testimony which is inconsistent with a witness's trial testimony. Such testimony is "admissible for substantive purposes provided that . . . (1) the witness can be effectively cross-examined at trial regarding the accuracy of the statement; and (2) the statement was not coerced and was more than a 'mere confirmation or denial of an allegation by the interrogator,' i.e., the statement must be that of the witness and not the interrogator." In addition, "if [the prior grand jury testimony] concerns an element of the crime, there is a separate requirement that the Commonwealth must meet to sustain its burden on the element: there must be other corroborating evidence on the issue." *Id*. at 193. In *Clements*, a murder case, the defendant alleged that there was insufficient evidence corroborating the witness's identification of him before the grand jury. The Court, however, finds sufficient corroboration in the same witness's selection of the defendant's picture from a police photo array a month after the shooting. (Evidence of that identification was substantively admitted at trial under *Commonwealth v. Weichell*, 390 Mass. 62, 71 [1983].) The Court rejects the defense argument that the witness's recantation of that photo identification should disqualify it as corroborating evidence. The Court is also unwilling to require that the corroborating evidence have been given under oath or that it "be of a different nature from the grand jury testimony or . . . emanate from a different witness." Various factors to which the witness testified at trial, such as that he was pressured by the victim's family to identify the defendant and that his identification was made on the basis of rumors, rather than personal knowledge, went only to the weight of the out-of-court identifications, not their admissibility. It was for the jury to arrive at a verdict by choosing between the pretrial identifications and the in-court disavowal.

In *Carrasquillo*, the shooting victim identified the defendant as his assailant in discussions with the police both before and after his grand jury testimony. However, on the eve of trial he told the prosecution that he would not testify. Constrained by a grant of immunity, he did testify at trial. But in his testimony he repudiated his earlier identifications of the defendant as the shooter, saying that in actuality he only saw the shooter from the waist down and simply assumed that the defendant was the shooter. He also said that he was on probation for a drug offense when he testified before the grand jury, that the police intimidated him into testifying there, and that he simply gave the defendant's name to the grand jurors "to get my dignity back so you all can leave me alone." The Appeals Court finds sufficient corroboration in an excited utterance by the victim, identifying the defendant as the shooter shortly after the incident, as well as an argument between the defendant and the victim only minutes before the shooting and the recovery of a 38 caliber gun from the defendant's apartment following the shooting.

PRACTICE TIP: These two cases present a common scenario for defense attorneys. The fact that both defendants were convicted without any strong circumstantial evidence or any live witness who testified that the defendant was the shooter is troubling. It seems that the prosecution's case grows stronger, rather than weaker, with the witness's recantation of his pre-trial identification. The prosecution argument that the recantation is a lie prompted by fear or loyalty seems capable of trumping any other possible problem in the original identification. In arguing such cases to the jury, consider presenting the matter in the following fashion (here using the witness's testimony in *Clements* as an example): If Witness had come before you, persisting that his identification was correct and that the defendant was the shooter, but I had managed to drag from Witness through cross-examination that he was highly intoxicated at the time of the incident, that he did not really see who shot his companion, that he had been pressured by the deceased's family to identify the defendant as the shooter, and that he simply gave the defendant's name as that of the shooter based on idle rumors, rather than personal knowledge, would any of you have hesitated to reject that identification and acquit the defendant? Why then should the result be any different where Witness, rather than persisting in his misidentification, has honestly come before you and admitted to his mistake and the circumstances which led him to make that mistake, thus saving me the task of squeezing those facts from him through cross-examination?

EVIDENCE: HEARSAY: GRAND JURY TESTIMONY, ADMITTED AS SUBSTANTIVE PROOF

In *Commonwealth v. Garrey*, 436 Mass. 422 (2002), the Supreme Judicial Court makes several points with respect to the admission of Grand Jury testimony as substantive proof under *Commonwealth v. Daye*, 393 Mass. 55 (1984). First, the required showing that the witness's trial testimony is inconsistent with his Grand Jury testimony must be made separately for each portion of the Grand Jury testimony offered in evidence. Second, the witness's status as a hostile witness does not relieve the party who wishes to offer the Grand Jury testimony of the burden of first eliciting the inconsistent trial testimony. 436 Mass. at 432. Third, the probative admissibility of the inconsistent Grand Jury testimony is a question of law reserved for the judge. The jurors should *not* be instructed to make their own determination of the foundation requirements before considering the evidence substantively. *Id*. at 439.

EVIDENCE: HEARSAY: SPONTANEOUS UTTERANCE EXCEPTION; REBUTTAL EVIDENCE
Commonwealth v. King, 436 Mass. 252 (2002), *Commonwealth v. Carrasquillo*, 54 Mass. App. Ct. 363 (2002) and *Commonwealth v. Johnson*, 54 Mass. App. Ct. 224 (2002), are yet three more in the long line of cases (especially "domestic" cases in which the alleged victim is uncooperative with the prosecution) upholding the discretion of a trial judge to admit as spontaneous utterances statements made hours after the alleged "exciting event." In *King*, discussed at Evidence: Privilege: Fifth Amendment, Waiver by Testimony, the complainant, crying and shaking, told police that "just moments" before their arrival her boyfriend, the defendant, had assaulted her. The Court makes it clear that the "underlying exciting event may be proved by the excited utterance itself." *Id*. at 255. Furthermore, once the judge determines within his "broad discretion" that the foundational requirements of the spontaneous utterance exception have been met (i.e., that the statement was made under the influence of an exciting event, before the declarant had time to contrive or fabricate the statement, and that the statement tended to qualify, characterize and explain the underlying event), the judge has no discretion to exclude the statement. Here, the complainant later retracted her statement, and defense counsel asked the judge to exclude the spontaneous utterance as unreliable in light of the retraction. The Supreme Judicial Court agrees with the judge that he had no power to do so. The foundation requirements alone ensure that the utterance has sufficient reliability to be admitted in evidence. The declarant's retraction goes not to the admissibility of the utterance, but to the assessment of the weight to be given it by the finder of fact. The Court does acknowledge that, "[a]s with any other witness, the declarant must have personal knowledge of the event in question, and must be competent." *Id*. at 235. The Court implies that a high level of intoxication by the declarant might render the utterance inadmissible, but the declarant's level of intoxication here did not approach that level.

In *Carrasquillo*, summarized at Evidence: Hearsay: Grand Jury Testimony, Admitted as Substantive Proof, the complainant, shot in the pelvis, managed to walk six or seven blocks to a hospital emergency room, where he was determined to be in danger of bleeding to death. He was upset and in great pain. Questioned by a police officer while being treated a half hour or so after the shooting, he identified the defendant as the man who shot him. The Appeals Court upholds the trial judge's exercise of discretion in admitting the complainant's statements as a spontaneous utterance, notwithstanding that the complainant at one point said that he did not want to talk and there were "moments of hiatus in [his] speech perhaps allowing for some deliberation." Nor was the result altered by the fact that the identification occurred in response to the officer's question or that the complainant arguably had a motive to implicate the defendant. *Id*. at 369.

In *Johnson*, the complainant asserted her Fifth Amendment privilege not to testify at the trial of the defendant (her boyfriend/pimp) on charges of assault and battery by means of a dangerous weapon (a gas grill lighter) and simple assault and battery. The testimony of police and hospital personnel who saw the complainant's injuries left no doubt that she had been severely beaten and had first and second degree burns on her breasts. Although the various out-of-court statements of the complainant describing in lurid detail the appalling abuse she had suffered at the hands of the defendant were made between one and four and one-half hours after she escaped from him, the Court holds, in light of the testimony of her mother, police officers, and a nurse as to her highly agitated state, that the judge did not abuse his discretion in concluding that the statements were "spontaneous to a degree which reasonably negated premeditation or possible fabrication." *Id*. at 229-230, quoting *Commonwealth v. Santiago*, 52 Mass. App. Ct. 667, 671 (2001). In order to impeach the spontaneous utterances, as permitted by *Commonwealth v. Mahar*, 430 Mass. 643, 649-650 (2000), the defense offered evidence of subsequent inconsistent out-of-court statements by the complainant, including statements to a defense investigator attributing her injuries to someone else. As rebuttal, the prosecution was allowed to produce testimony from its victim-witness advocate that she had seen the complainant talking with the defendant that very morning and that the complainant did not appear upset or fearful of the defendant. The allowance of this rebuttal testimony to suggest that the complainant's recantation was made at the instance of the defendant was, according to the Appeals Court, within the judge's "nearly unreversible" discretion to allow rebuttal testimony. 54 Mass. App. Ct. at 233.

PRACTICE TIP: The *King* opinion includes quotable language reminding judges that recantations in domestic cases are not always false: "We recognize that victims of domestic violence often change their minds about whether to testify and whether to press charges in connection with a prior attack. . . . That does not mean, however, that every recantation by such a victim witness is to be discredited or simply assumed to be the product of that phenomenon." 436 Mass. at 262.

EVIDENCE: HEARSAY: STATE OF POLICE KNOWLEDGE EXCEPTION
The defendant, accused of lewd, wanton and lascivious conduct, G.L. c. 272, § 53, explained to the jury that, following a wedding reception, he had an upset stomach. As he drove home, he removed his belt to relieve his discomfort. He turned on the dome light in order to locate some antacid tablets which were in the back of the car. Between his legs he was

holding an open bottle of water with his thumb over it to keep it from spilling. He planned to use the water to wash down the antacid tablets. Unfortunately, the prosecution's star witness, a trucker whom the defendant passed on the highway, misinterpreted what he saw. The trucker testified that the defendant had his pants unbuttoned and was holding his erect penis with one hand as he drove with the other. The trucker used his cell phone to report what he had seen to the police. A state trooper stopped the defendant's car shortly thereafter. At trial, the trooper testified, without objection by defense counsel, that she told the defendant she was stopping him because of "several phone calls" reporting that he was "exposing himself." The Appeals Court holds that this testimony created a substantial risk of a miscarriage of justice. *Commonwealth v. Parkes*, 53 Mass. App. Ct. 815 (2002). Relying on *Commonwealth v. Rosario*, 430 Mass. 505, 508-510 (1999), the Court identifies three prerequisites for admitting evidence under the "state of police knowledge:" exception to the hearsay rule: "[1] It [must be] based on the police officer's own knowledge, [2] it [must b limited to the facts required to establish the officer's state of knowledge, and [3] the police action or state of police knowledge [must be] relevant to an issue in the case." 53 Mass. App. Ct. at 819-820. Here, the trooper's stop of the defendant was adequately explained by the call made by the trucker who testified. The references to other callers was thus unnecessary and "appear[ed] specifically designed to put before the jury that [the trucker] had not been alone in reporting the defendant's self-exposure." *Id*. at 820.

PRACTICE TIP: Explanations by police witnesses of their reasons for stopping, arresting, or searching the defendant are most commonly elicited by prosecutors in drug trials, but the ploy is not limited to such cases, as *Parkes* illustrates. Always object to a prosecutor's questions seeking an officer's explanation of his or her reasons for acting. The first line of defense is that such an explanation is hearsay and irrelevant. If the judge decides that some explanation by the officer is in order, seek to limit the explanation as narrowly as possible. Remind the judge of the warning in *Commonwealth v. Rosario*, 430 Mass. 505, 508-509 (1999), that this type of evidence "carries a high probability of misuse," and that it should be "carefully circumscribed." In cases in which you suspect in advance of trial that the prosecutor will try to elicit "state of police knowledge" testimony, move in limine to exclude such testimony or to limit it to a bare reference to "acting on information received."

EVIDENCE: HEARSAY: STATEMENT AGAINST PENAL INTEREST EXCEPTION

The defendant was accused of setting fire to a house owned by her and her husband in order to collect on the insurance. At trial, defense counsel offered in evidence a letter written by the husband in which he stated that he "may" have been responsible for the fire because he was smoking crack in the basement shortly before the fire started. The judge refused to admit the letter and also refused to force the husband to testify when he asserted his Fifth Amendment privilege. *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785 (2002). The defendant argued that her husband waived his privilege when he gave a deposition in a civil lawsuit against the insurance company to collect on the policy. However, the "waiver by testimony" rule does not extend to proceedings other than the one in which the witness testifies. The defendant's criminal case and the civil action were "clearly separate proceedings." *Id*. at 789-790. The Court was more receptive to the defendant's argument that her husband's letter should have been admitted under the hearsay exception for statements against penal interest. His assertion of his Fifth Amendment privilege made him "unavailable." The letter sufficiently subjected him to criminal liability, even though he said no more than that he "may" have caused the fire. The out-of-court statement need not be a "direct admission of guilt." It is enough that it "would have probative value in a trial against the declarant." Here, the statement "tended to subject [the husband] to criminal liability and 'any reasonable person in his position would have known as much, and for that reason would not have made the statement without believing it to be true.'" *Id*. at 791, quoting *Commonwealth v. Tague*, 434 Mass. 510, 516 (2001). When use of a statement against penal interest is sought to exculpate a defendant, a third condition of its admissibility applies. It must be corroborated by circumstances indicating its trustworthiness. A trial judge should not, however, "be stringent" in evaluating corroboration. In close cases, she "should favor admitting the evidence and rely on the good sense of the jury to correct any prejudicial impact." Sufficient corroborating circumstances were present here: Among other things, there was no evidence that the defendant was in the basement before the fire started there, while the defendant's daughter testified that she saw the husband come up from the basement shortly before the fire was discovered. *Id*. at 791. The judge's error in denying admission of the exculpatory letter was "one of constitutional dimension," and, because it was not "harmless beyond a reasonable doubt," reversal of the defendant's conviction was required.

EVIDENCE: HEARSAY: STATEMENT BY JOINT VENTURER EXCEPTION

In *Commonwealth v. Goodman*, 54 Mass. App. Ct. 385, 392-393 (2002), the defendants were convicted, as joint venturers, of setting fire to a dry cleaning business which they owned. At trial, the prosecution introduced, without objection, the deposition testimony of one of the defendants in a civil action they had brought to recover insurance proceeds for the fire. The testimony was given before the arson charges were brought against the defendants. The Appeals Court finds no

substantial risk of a miscarriage of justice to the non-testifying defendant in the admission of this testimony. Aside from the fact that the deposition testimony merely duplicated other evidence at trial, the Court suggests that it was also admissible under the hearsay exception for statements of a joint venturer made during the pendency of the venture and in furtherance of its goal – namely, to collect on the insurance for the fire.

EVIDENCE: MOTIVE OF PROSECUTION WITNESS TO LIE, DEFENDANT'S RIGHT TO PRESENT

In *Commonwealth v. Barboza*, 54 Mass. App. Ct. 99, 109-110 (2002), summarized at Search and Seizure: Wiretap, by Private Party, Exclusionary Rule, defense counsel attempted to impeach both the child rape complainant and the child's mother by eliciting that they had consulted with a lawyer about suing the defendant. The trial judge was wrong in prohibiting this cross-examination. See *Commonwealth v. Elliot*, 393 Mass. 824, 828-829 (1985) ("The institution of a civil suit based upon a criminal offense, while entirely legitimate, can create financial motive for the victim to falsify testimony in order to secure a criminal conviction. Therefore, we have recognized the defendant's right to probe into such matters to reveal a witness's bias and personal interest.") However, the error here was, according to the Court, harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt (including the tape-recorded telephone conversations in which the defendant refers to "making love" with the boy).

EVIDENCE: MOTIVE OF PROSECUTION WITNESS TO LIE, DEFENDANT'S RIGHT TO PRESENT

In *Commonwealth v. Tweedy*, 54 Mass. App. Ct. 56 (2002), the defendant was charged with rape and indecent assault and battery on his minor stepdaughter. At trial, he sought to introduce evidence of abusive phone calls made to his mother by the complainant (who was by then sixteen years old). The trial judge sustained the prosecutor's objections to cross-examination of the complainant about whether she had sworn at the defendant's mother or had told her she would never again see her grandchildren (i.e., the complainant's step-siblings). When the mother took the stand for the defense, the judge limited her testimony to the fact that the complainant had made numerous "abusive" telephone calls to her in which she had used "very bad language." The judge refused to permit her to testify as to the actual substance of the conversations, saying that the "positions" of the two families (i.e., the complainant's and the defendant's) were "pretty well-defined" and a verbatim recitation of the conversations would be of "minimal evidentiary value." Reading the judge's ruling as "exclud[ing] only the exact wording of [the complainant's] 'foul' and 'abusive' language," the Appeals Court upholds the ruling as falling "within the broad range of his discretion" to limit inquiry about bias where the subject has been sufficiently aired. *Id*. at 60. The exclusion of other defense evidence of bias was either proper due to the lack of an adequate offer of proof or harmless in light of ample other evidence of the hostility the complainant and her mother bore toward the defendant and his mother.

EVIDENCE: OFFICIAL RECORDS, AUTHENTICATION

In *Commonwealth v. Deramo*, 436 Mass. 40, 45-52 (2002), summarized at Search and Seizure: Reasonable Suspicion, Traffic Stop for Operating after License Revocation, the prosecution was allowed, over defense objection, to enter in evidence certain copies of Registry of Motor Vehicle records to prove that the defendant's license had been revoked for driving under the influence. The documents in question were xerox copies of the attested copies which the police obtained from the registry. Because they were copies, they contained only a copy of the registrar's attestation, rather than an original attestation. The Supreme Judicial Court agrees with the defendant that they should not have been admitted in evidence. Under both G.L. c. 233, § 76, and G.L. c. 90, § 30, copies of official records cannot be admitted in evidence unless they bear an original attestation, signed by the relevant custodian, that they are correct copies of the original records. The Court rejects the prosecution's argument that "the accuracy of modern photocopying technology makes such attestation requirements unnecessary." Here, the trial court's own file contained a properly authenticated copy of the records in question. To the extent that the copy admitted in evidence was identical to that authenticated copy, the defendant was not prejudiced by the error in admitting the unauthenticated copy. Indeed, under Proposed Mass. R. Evid. 901(b)(3), the authentication requirement may be satisfied by "[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated." The unauthenticated copy, however, contained a letter, not contained in the authenticated copy, notifying the defendant of his license suspension. While this letter should have been redacted from the copy used at trial, the failure to do so was harmless because other evidence established that the defendant knew that his license had been revoked.

EVIDENCE: OPINION: LAYPERSON, CONCERN THAT "SOMETHING WAS WRONG," "FUNNY FEELING" THAT DEFENDANT WAS DRINKING

In *Commonwealth v. Orben*, 53 Mass. App. Ct. 700 (2002), summarized at Crimes: Motor Vehicle: Operating under the Influence, Sufficiency of Evidence, the DWI defendant's wife testified that, after speaking by phone with him, she became "concerned that something was wrong." The Appeals Court treats this as admissible lay testimony as to the

defendant's lack of sobriety, although the witness made no mention that her concern was related to alcohol consumption. In the same trial, the defendant's daughter-in-law testified that, after a telephone conversation with him, she had a "funny feeling" he was drinking. Again, the Court treats this as an admissible opinion as to the defendant's intoxication.

PRACTICE TIP: In numerous other decisions, appellate courts have held inadmissible a witness's suspicions or concerns that something was wrong: For example, in Commonwealth v. Martin, 417 Mass. 187, 189-191 (1994), it was reversible error to allow a witness to testify that she had "instincts that something had happened" and that she "had suspicion that [the defendant] had something sexually to do with [the minor sexual assault complainant]." In Commonwealth v. McIntyre, 430 Mass. 529, 540-541 (1999), it was error to allow witnesses in a murder trial to testify about their premonitions of trouble at the party where the victim was killed. See also Commonwealth v. Yetz, 37 Mass. App. Ct. 970, 971-972 (1995) (a witness's testimony "that he saw the defendant and the [minor sexual assault] complainant on the couch together and it looked 'suspicious'" was improper); Commonwealth v. DeMars, 38 Mass. App. Ct. 596, 597-598 (1995) (error to let witness testify he "ha[d] some concerns about sexual abuse"); Commonwealth v. Lennon, 399 Mass. 443, 445-446 (1987), and cases there cited.

EVIDENCE: OPINION: LAYPERSON, SPEED OF PASSING CAR

In *Gonzalez v. Spates*, 54 Mass. App. Ct. 438, 445-446 (2002), a negligence action arising out of a car accident, the Court holds that the trial judge acted within her discretion in barring an eyewitness, who saw the defendant's truck for only about three seconds, from estimating the truck's speed in miles per hour – especially where the judge allowed the witness to testify that the car was moving "very fast."

EVIDENCE: PRIOR BAD ACTS: PRIOR ASSAULT BY DEFENDANT ON CHILD RAPE COMPLAINANT

In *Commonwealth v. Donlan*, 436 Mass. 329 (2002), discussed at Sexual Assault: Rape, Penetration, Lesser Included Offense, the child rape complainant was permitted to testify about an incident, a week to ten days before the alleged rape, in which the defendant grabbed her while he was in the bathtub naked. This testimony was properly admitted to show the defendant's motive or intent. It was "sufficiently relevant and close in time to overcome any risk of undue prejudice." *Id*. at 339.

EVIDENCE: PRIOR BAD ACTS: PRIOR ASSAULT BY DEFENDANT TO SHOW JEALOUSY AS MOTIVE, RIGHT OF DEFENDANT TO PRESENT EVIDENCE TO REFUTE THAT MOTIVE

In *Commonwealth v. Garrey*, 436 Mass. 422, 432-434 (2002), the defendant was charged with first degree murder in connection with stabbing a man who had a brief affair with his girlfriend. The Court upholds the admissibility of evidence that, two months before the stabbing, the defendant attacked another "potential rival for [his girlfriend's] affections." The evidence was sufficiently recent and relevant to show jealousy as the motive for the stabbing. Prior bad acts offered to establish motive, unlike those offered to prove identity, need not share unique characteristics with the acts on trial. While the judge should not have referred to the prior incident as relevant to show a "pattern of conduct," the jury presumably followed the judge's instruction that the evidence could not be considered as character or propensity evidence. *Id*. at 433-434. Having determined that the prior incident was sufficiently close in time to be probative, the judge should also have admitted evidence proffered by the defendant that at the same time he expressed indifference to his girlfriend's relationship with the victim. The judge's exclusion of this testimony as too remote in time from the stabbing was erroneous, but the error was harmless because the testimony would have been merely cumulative of other evidence. *Id*. at 434.

EVIDENCE: PRIOR BAD ACTS: PRIOR DRUG SALES AS PROOF OF INTENT TO DISTRIBUTE

See *Commonwealth v. Gollman*, 436 Mass. 111, 113-115 (2002), discussed at Crimes: Drugs: Intent to Distribute: Expert Police Testimony, Evidence of Prior Drug Distribution, Sufficiency of Evidence, where the Supreme Judicial Court approves the admission in evidence of prior drug sales by the defendant as proof of his intent to distribute the drugs for which he was on trial.

EVIDENCE: PRIVILEGE, ATTORNEY-CLIENT: CROSS-EXAMINATION OF COOPERATING WITNESS ABOUT PROMISES BY PROSECUTION

At a murder trial, two co-defendants testified for the prosecution. Pursuant to the normal practice of the Hampden County district attorney's office, the witnesses were not offered any specific charge or sentence reduction in their own murder cases in exchange for their testimony. Instead, they were told that their cooperation in testifying would be "taken into consideration" in the disposition of their cases. The prosecution so informed counsel for the defendant. Both witnesses made this arrangement clear during their direct and cross examination and both admitted that they were hoping to get a

reduced sentence as a result of their testimony. During direct examination, the prosecutor asked one of the witnesses (1) whether his lawyer ever told him that the prosecutor had said he would get any particular sentence in exchange for testifying, and (2) whether his lawyer or the prosecutor ever told him that he would be able to plead to something different or that something different would happen to him as a result of testifying. The witness answered "no" to both questions. On cross-examination, defense counsel asked the witness whether he was hoping to be offered "simple manslaughter," instead of murder. When the witness disclaimed knowing what manslaughter was, counsel asked, "You don't know what it is? Well you had discussions with your attorney; is that correct?" The witness answered "yes," but the prosecutor's belated objection on the basis of "privilege" was allowed. Defense counsel asked nothing more on the subject and made no offer of proof. Nor did counsel suggest that the witness had waived his attorney-client privilege by answering the prosecutor's questions on this subject. In a motion for a new trial following his first degree murder conviction, the defendant challenged the practice of the Hampden County district attorney's office. The trial judge denied the motion without a hearing. On appeal, the Supreme Judicial Court affirms the conviction and the denial of the new trial motion. *Commonwealth v. Birks*, 435 Mass. 782 (2002). The defendant, buttressing his claim with affidavits from local defense attorneys, argued that the prosecutor's promise of "consideration" was actually an "implied promise that the witness would be able to plead guilty to a lesser charge." (In fact, the prosecutor reduced the charges of both witnesses here from first degree murder to manslaughter.) The Court holds that the judge properly declined to conduct an evidentiary hearing and decided this issue as one of law based on the pleadings and affidavits. The Court finds the issue "not substantial," since the issue of witness bias and what the witnesses hoped to gain from their testimony was fully explored before the jury. *Id*. at 791-792. The Court offers its opinion that even a promise to a witness as vague as "consideration" must be disclosed to the defendant by the prosecution, but the prosecution did disclose the promise here. ***Id.*** at 787. The Court also notes that the defendant was entitled to cross-examine the two witnesses not only about what they had been promised by the prosecution, but also about what they were hoping or expecting to have happen with their cases. However, defense counsel did in fact question both witnesses about each of these subjects. *Id*. at 787 & n.4. With respect to the applicability of the attorney-client privilege to the cross-examination of such cooperating witnesses, the Court offers the opinion that the privilege, "when properly applied, should present no obstacle to inquiring into promises, rewards, and inducements made by the Commonwealth either directly to the witness or through counsel. The communication of such matters by the prosecutor is not privileged." *Id*. at 788. Specifically, the Court says that "what counsel conveyed from the prosecutor to the witness" is "subject to examination without violating attorney-client privilege." *Id*. However, "conversations between the witness and counsel, about whether to accept the terms offered by the prosecutor, or about the possible permutations of 'consideration' and how each might affect the witness's future, may well be confidential in nature and subject to the attorney-client privilege." *Id*. The Court leaves open the possibility that in some circumstances the privilege may have to "give way to the [defendant's] right of confrontation," citing *Commonwealth v. DiBenedetto*, 427 Mass. 414, 421 (1998), for that possibility if "there is no other way 'to get at the information.'" 435 Mass. at 788. The Court also upholds the trial judge's conclusion in the new trial motion that the witness did not waive the privilege by answering the prosecutor's questions on this subject. The prosecutor's first question related only to what the lawyer had or had not conveyed from the prosecutor to the witness – a matter not covered by the privilege. The portion of the prosecutor's second question which inquired about whether the witness's lawyer ever told him that he would receive a charge reduction or whether "something was going to happen different to [him] as a result of [his] testifying" seems to intrude into the privileged area, but the Court is willing to read the question in context as confined to communications from the prosecutor passed on to the witness by his lawyer and upholds the trial judge's ruling.

PRACTICE TIP: The question which prompted the prosecutor's attorney-client privilege objection here ("Well you had discussions with your attorney; is that correct?") was not in itself objectionable. See *Commonwealth v. Neumyer*, 432 Mass. 23, 29-30 (2000) ("under the traditional interpretation accorded all privileges," the "time, date, and fact of a communication between the [witness] and [the relevant professional]" is not protected). The real problem was that defense counsel, confronted with the prosecutor's objection, neither told the judge where he was going with the line of questioning nor attempted to continue the line. Since the witness's expectation of leniency was already apparent from other answers he gave, it is unclear what more further interrogation could have produced. In cases in which a prosecution witness is testifying in exchange for "consideration," defense counsel would do well to avoid, if possible, any reference to the witness's lawyer. Such a reference simply invites an objection on the basis of privilege. Instead, questions should be framed in terms of what the witness "understands." For example: "You are charged with first degree murder, aren't you?" "You understand that the penalty for that charge is life in prison without any possibility of parole, don't you?" "You also understand that no judge has the power to give you a sentence of any less than life without parole for first degree murder, don't you?" "You understand that the only way that you can get a sentence of any less than life without parole for your first degree murder charge is if the prosecutor agrees to reduce the charge, don't you?" "You understand that only the prosecutor – and not any judge – can reduce that charge, don't you?" "The prosecutor in your first degree murder case is

the same prosecutor who is prosecuting this case in which you are now testifying, isn't she?" "You understand, don't you, that she is the one who, at the conclusion of your testimony and this trial, will decide whether to reduce your first degree murder charge and how far to reduce it?" "You understand that she is the one who will decide what sentence to recommend that you serve on that reduced charge?"

The practice of offering only "consideration," rather than a specific charge reduction or sentence, in exchange for the witness's testimony should be looked at as enhancing the possibilities for cross-examining the witness, rather than as an impediment. The practice leaves it to the prosecutor – normally the same prosecutor who is prosecuting the case on trial – to decide after trial how helpful the witness has been and to adjust the reward accordingly. This gives the witness a large stake in seeing the defendant convicted, since a prosecutor who does not get her conviction is unlikely to be very grateful to the witness. It also gives the witness an interest in implicating the defendant as much as possible so as to impress the prosecutor with how helpful his testimony has been. At the same time, it does not relieve the witness of the incentive to downplay his own involvement in the crime, since the prosecutor will presumably consider the amount of that involvement in arriving at a charge and sentence for the witness. If the prosecutor elicits from the witness that he has not been "promised" any charge or sentence reduction, or if defense counsel otherwise feels that the term "consideration" unfairly downplays what the witness stands to gain from his testimony, counsel should consider calling members of the defense bar as witnesses at trial to explain the significance of "consideration" in the context of the practice of the local district attorney's office.

EVIDENCE: PRIVILEGE: BURDEN OF ESTABLISHING

Miller v. Milton Hospital & Medical Center, Inc., 54 Mass. App. Ct. 495 (2002), involves an evidentiary privilege not often encountered by criminal defense attorneys, the statutory privilege for a "proceeding, report or record" of a "medical peer review committee" under G.L. c. 11, § 204. However, the opinion reiterates a point worth remembering about privileges in general: The party asserting a privilege has the burden to establish that it applies. *Id*. at 499. The Court also notes that, "where . . . the applicability of the privilege is less than clear from the facts, or where the record permits alternative determinations of facts bearing on the privilege question, findings by the trial judge of subsidiary facts supporting the determination of the privilege question would assist appellate review." *Id*. at 501.

EVIDENCE: PRIVILEGE: FIFTH AMENDMENT, RELATED CIVIL TRIAL

After the defendant, a single parent, administered a severe disciplinary beating to his six-year-old son and eleven-year-old nephew, criminal charges were lodged against him, and care and protection ("C& P") proceedings were commenced to take his children from him. A superior court judge postponed the criminal trial until after the conclusion of the C & P case – apparently so that she would know at disposition the exact extent of the defendant's custodial responsibilities. The defendant, on the other hand, asked the juvenile court judge to continue the C & P trial until after the criminal case ended, so that he could testify about his current parental fitness at the C & P trial without his testimony being used against him at the criminal trial. The juvenile court judge denied this request. He also denied the defendant's request to limit cross-examination of him if he did testify. Instead, the judge ruled that the defendant could be cross-examined on any relevant issue and that, if he asserted his Fifth Amendment privilege at any point, his testimony would be stricken. In the trial which ensued, the defendant did not testify, and the judge awarded custody of the children to DSS. *Care and Protection of Quinn*, 54 Mass. App. Ct. 117 (2002). The Appeals Court upholds the custody award and the rulings of the juvenile court judge. A party to a C & P case may, of course, assert his Fifth Amendment privilege, and the judge cannot force him to testify. However, unlike in a criminal trial, in a C & P trial opposing counsel may comment on the failure to testify and the judge may draw a negative inference from the failure to testify. *Id*. at 121. The juvenile court judge also acted within his discretion in deciding not to continue the C & P trial until after the criminal case concluded. That decision properly turned on a balancing of the potential harm to the defendant against other relevant factors. Here, "the paramount interests of the children involved" and the action of the superior court judge in deferring the criminal trial until after the C & P trial supported the denial of the continuance, as did the defendant's failure to request a continuance until the scheduled day of trial. *Id*. at 122.

EVIDENCE: PRIVILEGE: FIFTH AMENDMENT, WAIVER BY TESTIMONY

Under the doctrine of waiver by prior testimony, "if an ordinary witness, not a party to a cause, voluntarily testifies to a fact of an incriminating nature he waives his privilege as to subsequent questions seeking related facts." *Taylor v. Commonwealth*, 369 Mass. 183, 189 (1975). In *Commonwealth v. King*, 436 Mass. 252, 257-262 (2002), the complainant in a domestic assault and battery case testified at a hearing in limine to determine the admissibility of her alleged spontaneous utterance about the incident. In that testimony, she recanted the utterance. Concerned that the complainant's recantation might expose her to criminal prosecution, the judge appointed counsel for her. The complainant subsequently

invoked her Fifth Amendment privilege not to testify at the defendant's trial. When defense counsel argued that the complainant had waived her privilege by testifying at the voir dire hearing, the judge expressed the opinion that, because the complainant had not been expressly advised of her Fifth Amendment privilege before she gave her voir dire testimony, she had not waived the privilege by testifying. The Supreme Judicial Court reverses. "[T]he doctrine of waiver by prior testimony 'is not based on any true waiver theory at all in the usual sense of a voluntary, intelligent relinquishment of a known right." *Id*. at 259, quoting *Taylor, supra*, at 189. Thus, the waiver need not be either "knowing" or "intelligent." It must, however, be "voluntary." Whether the witness was aware of the privilege, albeit important, is only one of many factors that may affect the voluntariness of the waiver. The trial judge, by reducing his voluntariness inquiry to the single factor of whether the witness had been made aware of the privilege, improperly truncated the inquiry. The case was remanded for a further hearing on whether the complainant's voir dire testimony constituted a waiver of her privilege.

See also *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785, 789-790 (2002), summarized at Evidence: Hearsay: Statement against Penal Interest Exception, holding that a civil lawsuit by the witness to collect insurance proceeds for a fire and a criminal case for arson against his wife in connection with the fire were not the "same proceeding," so that the witness's deposition testimony in the former did not waive his Fifth Amendment privilege in the latter. See also *Commonwealth v. Pimental,* 54 Mass. App. Ct. 325, 332 (2002), summarized at Jury Instructions: Specific Unanimity, Theory Not Supported by Evidence, where the Appeals Court hypothesizes that a witness who voluntarily acknowledged his unlicensed possession of a firearm may by doing so have waived his Fifth Amendment privilege "as to subsequent questions seeking related facts."

EVIDENCE: PRIVILEGE: PRIEST-PENITENT

In *Commonwealth v. Marrero*, 436 Mass. 488, 495 (2002), the Supreme Judicial Court declines to extend the priest-penitent privilege embodied in G.L. c. 233, § 20A, to cover statements made by the defendant to the lay manager of a Christian drug and alcohol rehabilitation center, even though the facility was operated by an ordained minister and the defendant was allegedly seeking "religious or spiritual advice or comfort." The Court also finds the defendant's case an inappropriate one in which to consider the possible adoption of Proposed Mass. R. Evid. 505, which would expand the definition of "clergyman" to include "a minister, priest, rabbi, accredited Christian Science practitioner, *or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him*."

EVIDENCE: PROFILE TESTIMONY

In a juvenile court proceeding to dispense with parental consent to three children's adoption, the judge appointed a nationally recognized expert on cult behavior as guardian ad litem for the children. The reason for the particular appointment was that the parents were active (one might say "fanatic") members of a religious cult. On appeal, the children's father asserted that the guardian's report, which compared the behavior of the father's group with typical cult behavior, contained impermissible profiling evidence. *Adoption of Fran*, 54 Mass. App. Ct. 455, 464-465 (2002). The Court rejects this contention and approves the use of profile-type evidence to help predict future behavior. The Court distinguishes this type of testimony from prohibited profiling evidence, which is "evidence to the effect that an individual's possession of a certain set of characteristics creates a likelihood that [he] committed a specific crime or engaged in a specific act. . . . Such testimony is forbidden for a variety of reasons, not the least of which is the logical fallacy inherent in attempting to use general group characteristics to determine whether a specific individual in fact engaged in a specific discrete act at some point in the past." *Id*. at 464-465.

EVIDENCE: VERBAL COMPLETENESS

According to several witnesses at a murder trial, the defendant admitted to them that he had stabbed the victim, adding that he would get away with it as he had once before and that it was self-defense. The trial judge ruled in limine that the witnesses could testify about the defendant's admission to the stabbing and his assertion that he would get away with it, but not to the rest of the statement. The defendant argued on appeal, based on the doctrine of verbal completeness, that the judge should also have admitted his assertion that "it was self-defense." *Commonwealth v. Garrey*, 436 Mass. 422, 435-437 (2002). The verbal completeness doctrine applies when the statement offered is "(1) on the same subject as the admitted statement; (2) part of the same conversation as the admitted statement; and (3) necessary to the understanding of the admitted statement." *Id*. at 436, quoting *Commonwealth v. Clark*, 432 Mass. 1, 14 (2000). According to the Court, the reference to self-defense could have applied to the prior incident that the defendant "got away with," rather than the stabbing on trial, and "the judge could not let the defendant take advantage of the ambiguity without affording the Commonwealth the same opportunity by referring to the prior bad act." 436 Mass. at 436-437. The judge gave the defendant the choice of admitting the entire statement, but the defendant declined. Interestingly, one of the witnesses, in spite of the ruling in limine, told the jury that the defendant said he "got away with it before." The defendant moved for a

mistrial, but the judge instead instructed the jury to disregard this testimony. This prompt curative instruction was, according to the Court sufficient to remedy any prejudice to the defendant. *Id*. at 435.

EVIDENCE: WITNESS TESTIFYING FOR PROSECUTION IN EXCHANGE FOR "CONSIDERATION" IN HIS OWN CASE

See *Commonwealth v. Birks*, 435 Mass. 782 (2002), discussed at evidence: Privilege, Attorney-Client: Cross-examination of Cooperating Witness about Promises by Prosecution.

EVIDENCE: WITNESS TESTIFYING FOR PROSECUTION UNDER IMMUNITY AGREEMENT

In *Commonwealth v. Marrero*, 436 Mass. 488, 497-502 (2002), the key witness against the two murder defendants was an alleged accomplice who testified pursuant to an agreement with the prosecution granting her, in exchange for her "truthful" testimony, immunity for any involvement she may have had in the murder and a disposition of probation in a pending drug case. The Court generally approves of the manner in which this agreement was handled during the trial. The major concern in such cases is to avoid any tendency for the jury to conclude that the prosecution has special knowledge of the truthfulness of the immunized witness's testimony. This concern is magnified when the jurors learn that the agreement is dependent on the truthfulness of the witness's testimony. The Court approves of the direct examination of the witness by the prosecutor here, although he did elicit in passing the witness's obligation under the agreement to tell the truth and that she could be prosecuted for perjury if she failed to do so. After the defendants used the agreement to challenge the witness's veracity during cross-examination, the prosecutor was properly allowed to introduce the actual agreement document in evidence. The judge then instructed the jury as required, both immediately after the witness's testimony and in his final instructions, to consider the witness's testimony "with particular caution and care" and that the prosecutor had no "special knowledge of the truthfulness of [the witness's] testimony." The Court suggests that the judge should have redacted the signatures of the witness's attorney and the prosecutor from the agreement, lest those signatures be seen by the jury as vouching for the witness's truthfulness. The Court also suggests that repeated references to the witness's obligation to tell the truth should also have been deleted. The Court also finds that the prosecutor's closing argument that the witness "tells the truth, at least as far as [he] could follow it," came "perilously close to the limits of permissible argument." *Id*. at 501. The Court, however, finds no reason for reversal in these matters, pointing to the absence of any objection by trial counsel and, in particular, to the judge's "complete and comprehensive " jury instructions on the subject. In fact, the Court appends a copy of these instructions, "with some revisions," to its opinion "for possible use by other judges in future cases." *Id*. at 501, 504. The bottom line, according to the Court, is that the jurors could not have been left with the impression that the prosecutor had a way to verify the truth of the witness's testimony or that the testimony was entitled to "high value because of rewards promised in the agreement for 'truthful' testimony." *Id*. at 502.

GRAND JURY: FORM OF INDICTMENT, DUTY OF PROSECUTOR TO INSTRUCT ON ELEMENTS OF OFFENSE

In *Commonwealth v. Levesque*, 436 Mass. 443, 457 (2002), summarized at Crimes: Manslaughter, Involuntary: Failure to Notify Fire Department of Fire One Accidentally Starts, the manslaughter bill submitted to the Grand Jury was framed in the statutory (G.L. c. 277, § 79) form for manslaughter in general (i.e., that the defendants "did assault and beat [the firefighters}, and by such assault and beating did kill the said [firefighters]"), rather than the more appropriate form for breach-of-duty involuntary manslaughter. The Supreme Judicial Court rejects the defendants' argument that this wording was insufficient to inform the grand jurors of the elements of the crime. The Court also reiterates that the prosecutor had no duty to instruct the grand jury on those elements. *Id*. at 458. According to the Court, its review of the grand jury transcript showed that "there is no possibility that the grand jurors were confused as to the Commonwealth's theory of manslaughter." *Id*. at 458. (It is hard to believe that the grand jurors had more than a general idea that failure to report the fire was the focus of the manslaughter indictment. Without some explanation of the principles of the law of involuntary manslaughter based on breach of duty, how could they really know the questions of fact to which they were supposed to apply the probable cause standard?)

GRAND JURY: SUFFICIENCY OF EVIDENCE

See *Commonwealth v. Simpson*, 54 Mass. App. Ct. 477 (2002), discussed at Crimes: Robbery, Armed: Unseen Gun, and *Commonwealth v. Levesque*, 436 Mass. 443, 447 (2002), summarized at Crimes: Manslaughter, Involuntary: Failure to Notify Fire Department of Fire One Accidentally Starts, for a discussion of the standard used to decide the sufficiency of evidence to sustain an indictment under *Commonwealth v. McCarthy*, 385 Mass. 160 (1982).

HABEAS CORPUS, STATE: INMATE CHALLENGE TO DISCIPLINARY GOOD TIME FORFEITURE
See *Crowley, Petitioner*, 54 Mass. App. Ct. 447 (2002), summarized at Prisoners: Discipline: Appeal of Good Time Forfeiture.

IDENTIFICATION: IN-COURT ONE-ON-ONE IDENTIFICATION OF DEFENDANT
See *Commonwealth v. Gomes*, 54 Mass. App. Ct. 1 (2002), summarized at Trial Procedure: Questioning of Witness by Judge, where a one-on-one identification of the defendant at trial by a witness who only a few hours before had failed to pick him out of a lineup did not give rise to a substantial risk of a miscarriage of justice.

IDENTIFICATION: JURY INSTRUCTIONS, FAILURE TO GIVE *RODRIGUEZ* *OR* *PRESSLEY* INSTRUCTION
Eighteen days after a sale of crack to a plain-clothes police officer in a school zone, the defendant was arrested and charged as the seller. The defense at trial was misidentification. The defendant testified, denying that he was even in the area where the drug sale was made on the night in question. The plain-clothes officer, however, testified that he had watched the seller from as close as ten to fifteen feet for sixty to ninety minutes before making the drug buy, and that the defendant, who had the same "unique feminine characteristics" as the seller and who, when arrested, was wearing the same large loop earrings as the seller, was in fact the seller. Defense counsel submitted a proposed jury instruction on identification adapted from a law review article and asked the judge to give that instruction, rather than the standard identification instruction contained in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310-311 (1978). The district court trial judge refused counsel's request and in fact refused to instruct the jury at all on identification. *Commonwealth v. Williams*, 54 Mass. App. Ct. 236 (2002). Not surprisingly, the Appeals Court reverses the defendant's conviction, holding that the judge was required to give both a *Rodriguez* instruction (as modified by *Commonwealth v. Cuffie*, 414 Mass. 632, 639-641 [1993], and *Commonwealth v. Santoli*, 424 Mass. 837, 845-846 [1997]) and an instruction on mistaken identification in accordance with *Commonwealth v. Pressley*, 390 Mass. 617, 619-620 (1983). The long duration of the officer's close-range observation of the seller did not excuse the omission of the *Pressley* instruction. The seller was a stranger to the officer, the sale was at night, and the circumstances (including, one would imagine, the eighteen-day gap between the sale and the identification and arrest of the defendant) did "not render inconceivable a good faith error." 54 Mass. App. Ct. at 241 n.6. The Court rejects the prosecution's argument that defense counsel failed to preserve the error. By proposing an identification instruction and objecting when the judge refused to instruct on the issue, counsel "fully discharged his burden to raise the issue and was entitled to receive applicable identification instructions." *Id.* at 241-242. In light of the judge's refusal to instruct on the issue of identification, "any subsequent specific defense request for a model charge would likely have been futile." *Id*, at 242 n.10. Nor did the request that the judge give counsel's proposed instruction, rather than the *Rodriguez* instruction, in any way suggest that counsel preferred no instruction at all if the proposed instruction were unacceptable to the judge.

JOINT VENTURE: MERE PRESENCE, DRUG DISTRIBUTION
The defendant drove a drug dealer to the location where the dealer sold heroin to an undercover State trooper. On appeal, he argued that the evidence established mere presence at, rather than participation in, the drug sale. The Appeals Court rules otherwise. *Commonwealth v. Maillet*, 54 Mass. App. Ct. 910 (2002). The Court finds two facts particularly damning: First, the defendant parked his vehicle in such a way as to block in the trooper's car; and second, in plain view of the defendant, another occupant of the defendant's vehicle walked over to the trooper's car, looked inside, then walked to the street and looked about in a manner clearly indicating that he was a lookout and that a crime was in progress. These and other less significant factors (including the defendant's clear view of the heroin sale before driving the seller away) were sufficient to allow a jury to find the necessary knowledge and intent to assist on the defendant's part. "[T]he line that, as to unlawful conduct, separates knowledge from participation is an uncertain one. It is for the jury to sort out from the evidence on which side of the line the defendant stood." *Id*. at 911.

JURY IMPANELMENT: PEREMPTORY CHALLENGE OF MINORITY JURORS
In *Commonwealth v. Vega*, 54 Mass. App. Ct. 249, 251-252 (2002), the Hispanic defendant challenged the prosecutor's use of peremptory challenges to strike two jurors with Spanish surnames. The first juror was one of four with Spanish surnames who were initially seated. The Appeals Court holds that the trial judge acted within his discretion when he did not require the prosecutor to offer a non-discriminatory reason for challenging that juror. Id. at 251. When the prosecutor struck the other Spanish-surnamed juror in the second round of challenges, the judge did ask him for an explanation. The prosecutor responded that the juror was "very tentative," "quite unsure of herself," "nervous and giggly," and had erroneously referred to "Framingham," instead of "Farmington," Connecticut. This, according to the prosecutor, led him to think she would be ill-suited to dealing with the relative subtlety of criminal concepts such as accessory before the fact

and felony murder. The trial judge excused the juror, inferably accepting this explanation. The Appeals Court accords the judge the "substantial deference" to which he is entitled in deciding the bona fides of a challenge, and rules that he did not abuse his discretion. *Id*. at 252.

JURY IMPANELMENT: PEREMPTORY CHALLENGE OF MINORITY JURORS

During the impanelment of a jury in a first degree murder case, the prosecutor used a peremptory to challenge what appeared to defense counsel to be the only African-American in the venire. Asked by the judge to explain the challenge, the prosecutor said that the juror's employment in a rehabilitative field might be some indication of her inclination to be sympathetic. After some discussion, the judge accepted this explanation and allowed the challenge. The Supreme Judicial Court upholds the judge's action in doing so. *Commonwealth v. Garrey*, 436 Mass. 422, 427-430 (2002). Although the defendant, the alleged victim, and all of the witnesses were Caucasian, the defendant was nonetheless "entitled to a jury selected by nondiscriminatory criteria, and prospective jurors are entitled to a discrimination-free selection process." *Id*. at 429 n.2. However, the fact that none of the participants in the trial was of the same race as the challenged juror could be considered in determining whether the challenge was based on race, rather than some other factor. *Id*. at 428. The normal rule that a judge must find a *pattern* of improper challenges before calling on the challenging party to give an explanation is relaxed when the venire contains only a few members of the racial group in question. Otherwise, "the venire [could] be substantially depleted of members of [the] group before a pattern can be identified by palpable evidence of improper exclusion." *Id*. at 429. Here, the judge properly required an explanation from the prosecutor, but also properly accepted the explanation given as bona fide. The judge is not permitted to independently suggest a basis for a challenge, but he must independently evaluate the basis offered to determine that it is not a pretext. The judge did not abuse his discretion in so determining here.

JURY IMPANELMENT: VOIR DIRE, JUROR ATTITUDE TOWARD INTERRACIAL DATING

In *Commonwealth v. Johnson*, 54 Mass. App. Ct. 224, 230-231 (2002), summarized at Evidence: Hearsay: Spontaneous Utterance Exception; Rebuttal Evidence, an African-American defendant was accused of a brutal assault upon his Caucasian girlfriend. The trial judge conducted an otherwise reasonably thorough individual voir dire of potential jurors on the subject of racial bias, but he refused the defendant's request to inquire whether they had "any opinions or feelings about domestic or romantic relationships between African-American males and Caucasian females" which might "affect their ability to decide this case based solely on the evidence {they] heard in court." The Appeals Court, relying on *Commonwealth v. Pope*, 392 Mass. 493, 503-505 (1984), holds that the judge did not abuse his discretion in refusing to make the requested inquiry.

JURY INSTRUCTIONS: CONSCIOUSNESS OF GUILT, JURY'S DUTY TO RETURN GUILTY VERDICT ON "MOST HEINOUS" CRIME PROVEN

In *Commonwealth v. Serino*, 436 Mass. 408, 419-420 (2002), discussed at Murder: Deliberate Premeditation, Malice: Sufficiency of Evidence, Jury Instructions, the judge instructed the jury that it was their duty in the first degree murder trial "to return the most heinous crime" proven by the prosecution. The judge's use of the word "heinous," according to the Court, simply conveyed to the jurors that they should convict on the most serious charge proven. It did not suggest to the jurors what the judge thought their verdict should be, and in fact the judge specifically told them elsewhere in his charge that, if they thought he was hinting how they should find, they should disregard that. Although the judge should not, in his instruction on consciousness of guilt, have referred to the possibility of evidence of the defendant's flight where there was no such evidence in the case, the error did create a substantial likelihood of a miscarriage of justice. The jurors would have understood the reference as merely an example of an action from which consciousness of guilt could be inferred, and the judge told them that they could draw such an inference only if they found evidence of the particular act.

JURY INSTRUCTIONS: CURATIVE

In *Commonwealth v. Birks*, 435 Mass. 782, 789-790 (2002), the trial judge mistakenly gave a consciousness of guilt instruction which referred to evidence that the defendant hid in a closet when the police came to arrest him in New York for the murder on trial. No such evidence had been introduced at trial. When her error was brought to her attention, the judge told the jury that she had "made a terrible mistake" and that she had given a consciousness of guilt instruction which she "had recently given in another case having absolutely nothing to do with this case." She told the jurors "to understand clearly that the reference to 'hiding in a closet' has nothing to do with this case . . . [or] this defendant . . . [or] the evidence against [him] whatsoever." The jurors were presumed to have followed this prompt curative instruction, and it adequately corrected the judge's mistake.

JURY INSTRUCTIONS: EXAMPLES PARALLELING THE FACTS OF THE CASE ON TRIAL
In *Commonwealth v. Moses*, 436 Mass. 598, 603-605 (2002), summarized at Murder: Extreme Atrocity or Cruelty: Sufficiency of Evidence, Constitutionality, the judge, in his instruction on deliberate premeditation, told the jurors, "For example, evidence that a defendant, after a quarrel, went to a room, picked up a gun and returned to shoot a victim, or that a defendant fired a second shot at a disabled victim would be such conduct that may be considered on the issue of deliberate premeditation." The Court rejects the defendant's argument that this instruction, which directly paralleled the evidence in the case on trial, unfairly focused the jury on the prosecution's theory of deliberate premeditation. In doing so, the Court points to boilerplate language in the judge's instructions, telling the jurors that they alone were to decide the facts, unaffected by him or the lawyers, and that, if he mentioned any evidence, he did so only by way of example and it did not lend any more significance to that evidence than to any other evidence.

JURY INSTRUCTIONS: INFERENCES
In *Commonwealth v. Vega*, 54 Mass. App. Ct. 249, 252-253 (2002), the Appeals Court gives a brief lecture on the proper explanation of the use of inferences to a jury. The lecture is prompted by the trial judge's instruction to the jurors that they "may draw inference upon inference if, at the base, there are . . . a fact or facts . . . that have been proved beyond a reasonable doubt." According to the Court, this instruction was an accurate statement of the law. "What is of the essence is that an inference may not be 'remote according to the usual course of events' from the evidence or subsidiary inference on which it is based." *Id*. at 253, quoting *Commonwealth v. Latimore*, 378 Mass. 671, 676 (1979). However, the Court offers its opinion that "[o]ne may doubt whether it is helpful to jurors to instruct them that they may draw inferences from inferences. Description of an inference as a logical deduction from a fact may be the better stopping off place." 54 Mass. App. Ct. at 253.

JURY INSTRUCTIONS: LESSER INCLUDED OFFENSES
See *Commonwealth v. Donlan*, 436 Mass. 329 (2002), summarized at Sexual Assault: Rape, Penetration, Lesser Included Offense, for a discussion of circumstances in which the element of penetration is sufficiently in dispute that a rape defendant is entitled to a charge on the lesser included offense of indecent assault and battery.

JURY INSTRUCTIONS: LESSER INCLUDED OFFENSES, FAILURE OF DEFENSE COUNSEL TO REQUEST INSTRUCTION
In *Commonwealth v. Mills*, 54 Mass. App. Ct. 552 (2002), the defendant was accused of assault and battery by means of a dangerous weapon (a shod foot) on his ex-girlfriend. The complainant, who was treated for a hematoma on her forehead, alleged that the defendant hit her, knocked her down, and kicked her. She described the defendant's footwear as "[not] like construction boots," but "almost in between a heavy sneaker and a construction boot or a snow boot." The defense at trial was alibi and that the complainant had simply fabricated the assault. Defense counsel did not request, and the judge did not give, a jury instruction on assault and battery as a lesser included offense of assault and battery by means of a dangerous weapon. The defendant was convicted, and he argued on appeal that his attorney was ineffective in not asking for the lesser included offense instruction and that the judge should have given the instruction sua sponte. The Court acknowledges that the judge would probably have been required to give the instruction if requested, since whether a particular piece of footwear is a dangerous weapon is normally a question of fact for the jury. Even in the absence of a defense request for an instruction on a viable lesser included offense, the judge should normally instruct on it. However, when the defendant has made a tactical decision to pursue an "all-or-nothing" strategy, the judge may respect that decision and has no duty to charge on the lesser included offense. Ideally, when no instruction is requested on a viable lesser included offense, the judge should initiate a conference with counsel to ascertain whether the failure to request the instruction was intentional. *Id*. at 554 & n. 3. Here, the Court concludes that defense counsel seems to have made a tactical decision not to request the instruction and is unwilling to rule, based on the trial transcript alone, that this case falls within the class of cases in which such a decision has been found to be "so patently unreasonable that it amounts to ineffective assistance." *Id*. at 555-556. The Court hints that a more appropriate way to present the claim of ineffective assistance would have been a new trial motion in which "a factual record regarding counsel's motivations, judgments and evaluations, factors that almost invariably require exploration before one can reach a reasoned conclusion that counsel failed to proceed in an effective manner," could have been developed. *Id*. at 556.

JURY INSTRUCTIONS: REASONABLE DOUBT, FAILURE TO GIVE
As a matter of state law, the failure of a trial judge to instruct the jury on the meaning of "reasonable doubt" is an error creating a substantial risk of a miscarriage of justice. *Commonwealth v. James*, 54 Mass. App. Ct. 908 (2002). The rule is otherwise under federal law in the First Circuit. *United States v. Olmstead*, 832 F.2d 642, 644-646 (1987). *Olmstead* holds that there is no violation of Federal due process if a judge who has properly instructed the jury on the presumption

of innocence and the burden of proof beyond a reasonable doubt refuses to give an instruction on the meaning of reasonable doubt.

JURY INSTRUCTIONS: SPECIFIC UNANIMITY, THEORY NOT SUPPORTED BY EVIDENCE

The defendant, a police officer, was accused of stealing six of the many guns entrusted to him as coordinator of a "gun buy-back" program in Taunton. The guns were supposed to be delivered to the state police for destruction. The defendant was convicted by a jury on a single-count indictment charging him with stealing "one or more firearms" "pursuant to the execution of a general larcenous plan and scheme," in violation of G.L. c. 266, § 30. (Under § 30(1), larceny of a firearm is a felony punishable by up to five years in state prison, even though the value of the firearm does not exceed $250.) Only four of the six missing guns were identified at trial. Two of these were not "firearms" as defined in G.L. c. 140, § 121, because they were not capable of discharging a shot or bullet. The other two identified guns were operable "firearms." *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325 (2002). On appeal, the defendant invoked the line of cases holding that a jury verdict cannot be allowed to stand if the jury was given more than one theory of guilt, one of which could not support a guilty verdict. See *Commonwealth v. Plunkett*, 422 Mass. 634, 638 (1996). The defendant essentially argued that the jury may have erroneously found him guilty for stealing the guns which were not "firearms." The Appeals Court rejects this argument, saying, "This is a case of one prosecution theory, and a single larcenous plan, with one or more items of evidence as proof of that plan." 54 Mass. App. Ct. at 327. The trial judge had instructed the jury that the prosecution was required to prove that the defendant "acted out of a single scheme, a continuing intent to steal." According to the Court, the evidence of the inoperable stolen guns was "relevant to the existence of the defendant's continuing intent to steal." *Id*. at 327-328. The Court finds adequate protection for the defendant in the judge's "clear instruction that the jury must find that the stolen property was in fact a 'firearm,' a term which the judge proceeded to define." *Id*. at 328.

The defendant also claimed that, although not requested to do so by trial counsel, the judge should have given a specific unanimity instruction to ensure that the jurors were unanimous as to the particular firearm or firearms that the defendant stole. The Appeals Court rejects this argument, observing that successive takings may properly be charged as a single larcenous scheme and quoting *Commonwealth v. Thatch*, 39 Mass. App. Ct. 904, 905 (1995): "When a single count is charged and where the spatial and temporal separations between acts are short, that is, where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents, a specific unanimity instruction is not required."

PRACTICE TIP: The rationale of the Court in *Pimental* is not very satisfying. The Supreme Judicial Court in *Plunkett* was unwilling to assume, as the United States Supreme Court does, see *Griffin v. United States*, 502 U.S. 46 (1991), that the jury rejected the theory of guilt for which there was no evidentiary support and adopted the theory for which there was support. As the *Plunkett* opinion explained, "If the [U.S.] Supreme Court's opinion were correct, a jury would never return a guilty verdict when the evidence was insufficient to warrant that verdict, and we know that is not so." 422 Mass. at 638. According to the *Pimental* opinion, each stolen gun did not "constitute a separate and distinct theory of guilt." Rather, there was "one prosecution theory, and a single larcenous plan, with one or more items of evidence as proof of that plan." 54 Mass. App. Ct. at 327. The fact remains, however, that the prosecution was obliged to prove that the defendant stole at least "one" firearm. The words of the indictment and the judge's instructions requiring the theft to be pursuant to a larcenous scheme did not relieve the prosecution of that burden. *Plunkett* involved a first degree murder trial in which the judge instructed the jury on felony murder, which was warranted by the evidence, and deliberate premeditation, which was not. The Court attached some importance to the judge's instructions ("If the judge tells a jury that they may find the defendant guilty on a theory that is factually unsupported . . . , the jurors understandably might believe that there must be evidence to support that theory." 422 Mass. at 639-640.) See *Commonwealth v. Purrier*, 54 Mass. App. Ct. 397 (2002), summarized at Crimes: Assault by Means of a Dangerous Weapon: Attempted Battery, Sufficiency of Evidence, for an application of this rule where the judge instructed the jury on both theories of assault. However, more recent cases have not limited *Plunkett* to theories on which the judge instructs the jury. See, for example, *Commonwealth v. Taylor*, 50 Mass. App. Ct. 901 (2000) (reversal required where the prosecution tried an indecent assault and battery case on two separate theories, "that either the defendant had 'made' the victim touch his penis, or that he touched the victim's buttocks with his penis," and the evidence at trial supported only the latter); *Commonwealth v. Grandison*, 433 Mass. 135, 146-147 (2001), *Commonwealth v. Berry*, 431 Mass. 326, 333-334 (2000), *Commonwealth v. Zuluaga*, 43 Mass. App. Ct. 629, 641 (1997). In *Pimental*, the fact that evidence of the stolen non-firearms was admissible to prove the larcenous scheme did not resolve the problem. The problem might have been avoided if the trial judge had given the jury a limiting instruction to consider that evidence only as bearing on the existence of the larcenous scheme and not as evidence that the defendant stole "one or more firearms." The problem might also have been avoided if the judge's charge had specifically limited the jury to the two operable firearms in deliberating whether the defendant

stole "one or more firearms." So far as the opinion reveals, trial counsel requested neither such instruction. With respect to the specific unanimity issue, counsel's failure to request the instruction was probably sufficient ground to reject the defendant's appellate claim. Appellate courts have routinely refused to find a substantial risk of a miscarriage of justice in the failure of a trial judge to give an unrequested specific unanimity instruction. See *Commonwealth v. Black*, 50 Mass. App. Ct. 477, 478 (2000), and cases there cited. The *Pimental* opinion's citation of *Thatch* as grounds for rejecting the defendant's claim is unconvincing. *Thatch* involved the trial of a single count of rape. The complainant also testified, however, that the defendant digitally penetrated her anus and vagina before having anal intercourse with her. The only defense at trial was consent. The Court held that the defendant's request for a specific unanimity instruction was properly denied, since "[a] unanimity instruction is required only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime charged." In *Pimental*, however, there appears to have been separate evidence from separate witnesses about each of the missing guns – a circumstance which would create a possibility of juror unanimity that the defendant stole a firearm, but not as to the particular firearm he stole.

JURY WAIVER: COLLOQUY, ADEQUACY

The defendant, facing trial in district court on charges of driving to endanger and driving under the influence of a narcotic drug, executed a written jury waiver form, as required by G.L. c. 218, § 26A, c. 263, § 6, and Mass. R. Crim. P. 19(a). Defense counsel filed the written certificate required by G.L. c. 218, § 26A, confirming that he had explained to the defendant the characteristics of the jury trial he was giving up. The judge then conducted an oral colloquy with the defendant in which he ascertained that the defendant was forty-three years old, born in this country, and had a tenth-grade education. The defendant acknowledged in the colloquy that he knew what a jury trial was, that he had discussed the waiver with his attorney, and that he was willingly and voluntarily giving up his right to a jury. However, in giving his own explanation of the rights the defendant was waiving, the judge omitted to describe his own function at a jury trial or to mention that a jury trial is a constitutional right and that the jury's verdict would have to be unanimous. He also advised the defendant, consistently with a proper plea colloquy but not a jury waiver, that he was giving up the right "to take the stand on your own behalf or not take the stand if you wish" and to "have your lawyer examine all of your witnesses and cross-examine all of the Commonwealth witnesses." The defendant then acknowledged that he was willingly and voluntarily giving up those rights. Convicted in the jury-waived trial that followed, the defendant challenged on appeal the adequacy of the colloquy. *Commonwealth v. Ridlon*, 54 Mass. App. Ct. 146 (2002). The Appeals Court upholds the jury waiver, concluding that the judge could permissibly have relied on the jury waiver form and defense counsel's certificate to supply the material omitted from the colloquy. The defendant argued that the assent he voiced to the judge's erroneous statement of the trial rights he was giving up showed that he did not in fact understand the meaning of the jury waiver. The Appeals Court rejects this argument, noting the absence of any language or cultural problem, and observing that the defendant did not "claim that he was uninformed or misinformed by defense counsel, or that he was pressured or under any disability at the time of the colloquy." *Id*. at 150. There was, in light of the defendant's other answers to the judge, his written waiver, and the certificate of his counsel, sufficient support for the judge's acceptance of the jury waiver. *Id*.

JUVENILES: SCHOOL-REPORTED CRIMES, INDIVIDUALS WITH DISABILITIES EDUCATION ACT

After uncovering evidence that the juvenile defendant, a high school student, had been selling marijuana at school, the principal contacted the police. Delinquency proceedings against the defendant ensued. The defendant moved to dismiss the charges because of the school's failure to comply with the requirements of the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq. *Commonwealth v. Nathaniel N.*, 54 Mass. App. Ct. 200 (2002). Assuming without deciding that the defendant, who had a long history of disruptive behavior at school, was disabled for IDEA purposes, the Appeals Court rejects his claim that the commencement of the juvenile court proceedings was a change in his educational placement which should have triggered procedural protections under the IDEA. The Court relies on a 1997 amendment to the IDEA which added language specifying that "[n]othing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(9)(A). The Appeals Court also rejects the juvenile defendant's claim that dismissal should be ordered as a remedy for the school's failure to comply with its obligations under a section of the IDEA, 20 U.S.C. § 1415(k)(9)(b), which requires that "[a]n agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reported the crime." The juvenile court judge, in denying the motion to dismiss, ordered the school to promptly provide these records to the juvenile court probation officer. The defendant attached the relevant records to his motion to dismiss, and there "is

no claim that the alleged lack of records affected the delinquency proceedings." *Id*. at 205. The Court concludes, "Whatever merits there may be in the juvenile's complaints about his school's response to his claimed disability, this is not one of those rare cases that warrants overriding a District Attorney's authority to decide whether to prosecute a case." *Id*. at 205-206. The Court also notes the confidentiality accorded to school records under federal regulations promulgated pursuant to the IDEA, 34 C.F.R. § 300.529(b)(2), which provide that "[a]n agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act." That Act, 20 U.S.C. § 1232g, sets out detailed controls on third party access to school records. 54 Mass. App. Ct. at 206.

MURDER: DELIBERATE PREMEDITATION, MALICE: SUFFICIENCY OF EVIDENCE, JURY INSTRUCTIONS

Evidence at the defendant's first degree murder trial suggested that he strangled his girlfriend. A prosecution expert testified that it usually takes five to eight minutes for manual strangulation to result in death. This testimony, suggesting that death was not instantaneous and that it required sustained pressure to the victim's neck for a prolonged period, was sufficient to warrant findings of deliberate premeditation and first-prong malice (i.e., intent to cause death). *Commonwealth v. Serino*, 436 Mass. 408, 411 (2002). Although the judge's charge on malice included the "frame of mind" language condemned in *Commonwealth v. Eagles*, 419 Mass. 825, 836 (1995), and erroneously defined third-prong malice as including acts creating a strong likelihood of grievous bodily harm (rather than only death), the Court finds both errors harmless since the manner in which the injuries were inflicted confirmed an actual intent to cause death. Similarly, the judge's erroneous instruction that a "reflex action" constitutes a general intent to murder and any ambiguities in his instruction on specific intent were harmless because he properly instructed the jury on the elements of premeditated murder, including that the defendant had first to make the decision to kill and then commit the killing in furtherance of that decision.

MURDER: EXTREME ATROCITY OR CRUELTY: SUFFICIENCY OF EVIDENCE, CONSTITUTIONALITY

The victim and his companion gave the defendant $250 for crack cocaine and were told to wait outside while the defendant paged his supplier. Repeated visits to the defendant's apartment yielded no results for the victim and his companion but did serve to aggravate the defendant. Following the third visit, the defendant announced to his sister that he was going to shoot the victim. He retrieved a pistol, went to where the victim was, and, despite the victim's pleas that he only wanted his money back, fired seven shots at him, hitting him with four shots, two of which were potentially fatal. A jury convicted the defendant of first degree murder on theories of deliberate premeditation and extreme atrocity or cruelty. *Commonwealth v. Moses*, 436 Mass. 598 (2002). On appeal, the defendant argued that the evidence was insufficient to warrant a finding of extreme atrocity or cruelty. The Court holds otherwise, pointing to evidence sufficient to support findings on three of the factors listed in *Commonwealth v. Cunneen*, 389 Mass. 216, 227 (1983): "extent of physical injuries, number of blows, . . . and disproportion between the means needed to cause death and those employed." 436 Mass. at 601. (See also *Commonwealth v. Garrey*, 436 Mass. 422, 426-427 (2002), where the defendant stabbed the victim after beating him with his fists and then kicked him three times in the head, and the Court found these actions to make out the *Cunneen* factor of "indifference to or taking pleasure in the victim's suffering.") The Court in *Moses* also rejects the defendant's arguments that the law of extreme atrocity or cruelty is unconstitutionally vague, and that it improperly permits a conviction without jury unanimity on any particular *Cunneen* factor. Jury unanimity is not required because the *Cunneen* factors are merely "evidentiary considerations," rather than elements of the crime. *Id*. at 605-607. See also *Commonwealth v. Obershaw*, 435 Mass. 794, 809 (2002).

MURDER: SUFFICIENCY OF EVIDENCE

In *Commonwealth v. Maynard* 436 Mass. 558 (2002), the Supreme Judicial Court seems to have been led by the heinousness of the defendant's actions to affirm his first degree murder conviction and, in doing so, to sweep under the rug troubling questions about the defendant's individual responsibility for the victim's death. The victim was a young man, apparently retarded, who was held captive in the home of the Perry family in Greenfield for a three-month period culminating in his death. During that period, he was repeatedly beaten, tortured, mutilated, and starved. The defendant was frequently present in the Perry home and was a regular participant in the torture and abuse of the victim. He was present when the victim died, and he helped to dispose of the body in a New Hampshire quarry. Two factors combined to raise serous problems in the defendant's murder prosecution: First, because of the body's prolonged immersion in water, the medical examiner could not say which specific injuries were the direct cause of death. He assigned as a cause of death "multiple blunt and sharp force injuries . . . over a period of time, and the resultant associated stress." He also stated that "*some of the wounds*, if left untreated, could have caused the victim's death." Second, the case was submitted to the jury on theories of individual, as well as joint venture, liability, and the jury returned a general verdict of guilty. As a result,

the conviction could not be upheld if the Court merely found sufficient evidence to sustain a verdict under the joint venture theory, as to which the proof seems overwhelming. The record had to contain sufficient evidence to warrant a finding of guilt as a principal as well. (The Court pointedly notes that "the preferable practice . . . would be to provide a verdict slip requiring the jurors to specify on which theory (or theories) they convict." *Id*. at 561 n.2.) The Court has no difficulty finding malice in the defendant's use of various dangerous weapons to beat and torture the victim. The more difficult question is whether the evidence showed that the defendant's individual actions were a cause of death, and specifically whether, without those actions, death would not have occurred. The medical examiner's vague opinion as to the cause of death and the participation of so many others in the torture and abuse of the victim would seem to offer no basis for a conclusion of "but-for" causation. The Court, however, sweeps this issue under the rug, remarking instead that the there may be more than one proximate cause of death and that "the evidence warranted the inference that the effects of the defendant's acts of abuse and violence toward [the victim] were operative at the time of his death, and a contributing cause thereof." *Id*. at 564.

PRACTICE, POST-CONVICTION: NEW TRIAL MOTION, ALLEGED INEFFECTIVENESS OF COUNSEL IN FAILING TO RETAIN EXPERT

In *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785, 793-794 (2002), summarized at Evidence: Hearsay: Statement against Penal Interest Exception, the Appeals Court rejects the defendant's claim on appeal that her trial counsel was ineffective in failing to retain an arson expert to rebut the testimony of the prosecution's expert. The Court rejects this claim because there was nothing in the record to show that a retained expert would have reached any conclusion other than that reached by the prosecution expert. (Presumably, the defendant should have presented this argument in a new trial motion and sought funds from the motion judge under Mass. R. Crim. P. 30(c)(5), 435 Mass. 1502 (2001), to retain an arson expert to review the evidence.)

PRACTICE, POST-CONVICTION: NEW TRIAL MOTION: EVIDENTIARY SUPPORT, FUNDS FOR EXPERT

See *Commonwealth v. Serino*, 436 Mass. 408, 414-416 (2002), discussed at Counsel: Ineffective Assistance: Failure to Retain Independent Expert to Evaluate Defendant for Competency.

PRACTICE, POST-CONVICTION: NEW TRIAL MOTION, RIGHT TO EVIDENTIARY HEARING

See *Commonwealth v. Birks*, 435 Mass. 782, 791-792 (2002), discussed at Evidence: Privilege, Attorney-Client: Cross-examination of Cooperating Witness about Promises by Prosecution.

PRACTICE, POST-CONVICTION: NEW TRIAL MOTION, WAIVER OF RIGHT OF APPEAL

The defendant, accused of assault and battery on a child under fourteen resulting in serious bodily injury with respect to both his one-year-old daughter and his three-month-old son, was tried first on the charge involving his son. Convicted in that trial of reckless assault and battery on a child, causing substantial bodily injury, he was sentenced to 5 to 7 years in state prison. Several months later, his trial attorney negotiated a plea for a concurrent house sentence on the charge involving the daughter. A condition of the plea was that the defendant drop the appeal which he had filed after his trial. More than a year later, the defendant filed motions for a new trial in which he sought to challenge the conviction which resulted from the trial. He alleged that trial counsel had been ineffective at the trial itself and also in advising him to waive his right of appeal as part of the plea agreement. The Appeals Court holds that these motions were properly denied. *Commonwealth v. Pike*, 53 Mass. App. Ct. 757 (2002). The defendant's claims of ineffective assistance at trial were not waived by the plea agreement, since trial counsel also represented the defendant in the plea in which he agreed to waive his right of appeal. *Id*. at 760-761 n.4. However, these claims lacked substantive merit. As for the defendant's claim that counsel was ineffective in connection with the plea when he told him that he had no meritorious appellate issues and should waive his appeal as part of the plea agreement, the Appeals Court is not at all convinced that counsel's advice was incorrect. In any event, however, the new trial motion was fatally defective because the defendant did not allege in it that he would have rejected the plea offer but for the allegedly incompetent advice. *Id.* at 762-763. Indeed, the Court questions whether the defendant is even now willing to forego the benefit of the favorable disposition of the charge involving his daughter in the plea agreement. It seems instead that he wishes to hold on to that favorable part of the agreement while disclaiming the part in which he agreed not to challenge the trial results. The Appeals Court is unwilling to let him have his cake and eat it too.

PRACTICE, POST-CONVICTION: PLEA WITHDRAWAL

In *Commonwealth v. Orben*, 53 Mass. App. Ct. 700, 706-707 (2002), summarized at Crimes: Motor Vehicle: Operating under the Influence, Sufficiency of Evidence, after the defendant was convicted of driving under the influence, defense

counsel told the judge that his client, who had previously waived his right to a jury in the subsequent offender portion of the trial, now wished to waive his right to a bench trial as well. Counsel said that, having spoken with the prosecution's police witnesses, he was satisfied as to the prosecution's proof of the earlier offenses. The judge, without inquiring directly of the defendant or engaging him in any colloquy whatsoever, asked the prosecutor to summarize the evidence she would produce if the subsequent offender issue were to be tried. After hearing that evidence, the judge pronounced the defendant guilty and proceeded to sentence him. On appeal, the defendant challenged this procedure, and the Appeals Court vacates the subsequent offender verdict. According to the Court, the procedure failed to meet the minimum requirements for either a guilty plea or a trial based on stipulated testimony.

PRISONERS: DDU CONFINEMENT, CONSTITUTIONALITY

A prisoner at MCI-Cedar Junction, sentenced to serve an additional year of his sentence in the Department Disciplinary Unit ("DDU") for spitting in the face of a correctional officer during his DDU confinement, filed a civil action in superior court seeking certiorari and a judgment declaring that the regulations establishing the DDU were void for vagueness and discriminated unconstitutionally against male prisoners because no comparable punishment was imposed on female prisoners. Acting on the Commissioner of Correction's motion for summary judgment, a superior court judge dismissed both of the prisoner's constitutional claims. *Todd v. Commissioner of Correction*, 54 Mass. App. Ct. 31 (2002). The Appeals Court affirms the dismissal of the void for vagueness claim, finding that the DDU regulations set sufficient standards to prevent their arbitrary and capricious application by prison officials. *Id*. at 35-37. However, the Court finds that the Commissioner's affidavit was insufficient to justify dismissal of the prisoner's equal protection claim. In the affidavit, the Commissioner asserted that, in his "professional experience and opinion, female inmates are far less likely to engage in as violent, predatory and repetitive kind of disciplinary conduct as men," and that for that reason "a comparable DDU for female inmates has not, and may never be, constructed." According to the Court, "Nothing in [the] affidavit provides factual support for this stereotypical assertion, and it is, alone, an insufficient basis for allowing summary judgment in this case." *Id*. at 39. The prisoner's case is remanded to superior court for further proceedings on his equal protection claim.

PRISONERS: DISCIPLINE: APPEAL OF GOOD TIME FORFEITURE

In *Crowley, Petitioner*, 54 Mass. App. Ct. 447 (2002), the Appeals Court holds that an action in the nature of certiorari is the proper vehicle for a prisoner to challenge the denial of good time in prison discipline proceedings after his administrative remedies have been exhausted. Under G.L. c. 249, § 4, the certiorari petition must be filed within sixty days of the final administrative decision. The prisoner in *Crowley* did not commence a timely certiorari action. Instead, he waited several years and then filed a state habeas corpus petition alleging that he had been improperly deprived of a total of 640 days of good time credits in four separate disciplinary proceedings. The Court holds that the habeas corpus petition was properly dismissed because such a petition cannot be used as a substitute for properly pursuing an available appellate remedy. The unavailability of certiorari when the habeas petition was filed was manufactured by the prisoner's own delay. The Court seems particularly troubled that the prisoner's challenge was to procedural irregularities in the disciplinary proceedings which would at most entitle the defendant to a new hearing. The grant of a writ of habeas corpus, however, would result in the prisoner's immediate release; it would, under a longstanding rule of law, be unappealable; and the defendant's release would in all likelihood result in the actual merits of the disciplinary sanctions never being reached. *Id*. at 453. The Court distinguishes the forfeiture of good time credits in a prison disciplinary proceeding from a disagreement as to the calculation of statutory good time credit. The Supreme Judicial Court has held that a habeas petition is a proper vehicle for challenging such miscalculations if granting the additional credit sought by the prisoner would result in his immediate release. *Pina v. Superintendent, M.C.I., Walpole,* 376 Mass. 659, 664-665 (1978).

PRISONERS: DUE PROCESS RIGHT TO PARTICIPATE IN CHILD CUSTODY PROCEEDINGS

A parent who is incarcerated in a Massachusetts jail or prison normally has a due process right to be habed to juvenile, district, or probate court to rebut adverse allegations concerning his parental fitness in proceedings involving the termination of his parental rights. When the parent is incarcerated in another state, a habe is probably not possible. In *Adoption of Edmund*, 50 Mass. App. Ct. 526 (2000), the Appeals Court held that, once such a parent requests to participate in the proceedings, due process requires that the judge devise a mechanism (such as video or telephone conferencing) to allow him to do so. In *Adoption of Whitney*, 53 Mass. App. Ct. 832 (2002), the Court holds that neither the participation of the defendant's appointed counsel in the proceedings or the acceptance of letters and a post-trial affidavit from the defendant provided "the requisite meaningful opportunity for [him] to rebut the adverse evidence offered as to his [parental] fitness." The defendant was released from prison six months after the trial on the termination of his parental rights. His release made him available both to testify in person and to act as a parent if determined fit. The Court orders the trial judge to reopen the proceedings and afford the defendant an opportunity to testify and to introduce

other relevant new evidence and witnesses.

PRISONERS: FREE SPEECH: PROFITS FROM WRITING ABOUT CRIMES COMMITTED

Following the United States Supreme Court decision in *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. 105 (1991), which struck down as unconstitutional New York's "Son of Sam" law, the Massachusetts legislature repealed its own similar law designed to prevent criminals from profiting by writing about their crimes. St. 1993, c. 478, § 3. The legislature drafted a new bill and asked the Supreme Judicial Court for an advisory opinion as to whether it would violate the right of free speech. The bill would require any publisher or other entity contracting with a "defendant" to submit a copy of the contract to the Victim Compensation and Assistance Division of the Attorney General's office if payments under the contract would constitute "proceeds related to a crime" {defined as money or property "acquired by means and in consequence of the commission of a crime"). If the Division then determined that the proceeds were "substantially related to a crime, rather than relating only tangentially to, or containing only passing references to, a crime," the publisher would be required to pay all of the proceeds to the Division, which would hold them in escrow for at least three years (or longer, if civil actions by any of the defendant's victims were still pending). The proceeds would be used to pay any judgments against the defendant, and at the end of the waiting period one-half of the remainder would be deposited into the victim compensation fund. Whatever was left would be returned to the publisher. The Supreme Judicial Court holds that this bill is unconstitutionally overbroad because it is a content-based regulation of speech which is not narrowly drawn to achieve the state's compelling interest in ensuring that criminals do not profit from their crimes and that victims are compensated by those who harm them. *Opinion of the Justices*, 436 Mass. 1201 (2002). The Court concludes that the bill would as a practical matter prevent the publication of any works by persons who have, at some point in their lives, engaged in criminal activity. The goals of the legislation could be more precisely achieved through probation conditions, writs of attachment in civil actions by victims, or, in appropriate cases, injunctive relief. *Id*. at 1208-1210. The legislation would also operate as an unconstitutional prior restraint on free speech because the restraint would be imposed without a prompt judicial determination in which the State bears the burden of proving that the particular writing falls within the ambit of the statute. *Id*. at 1210-1212.

PRISONERS: INMATE POLITICAL ACTION COMMITTEES

In *Massachusetts Prisoners Association Political Action Committee v. The Acting Governor*, 435 Mass. 811 (2002), the Supreme Judicial Court holds that G.L. c. 55, § 14, which prohibits solicitation of money for political purposes in buildings "occupied for state, county, or municipal purposes," bars fundraising by inmates in state correctional facilities for a prisoner political action committee. The Court further holds that this prohibition is reasonably related to legitimate penological interests and does not violate the prisoners' free speech, association, and equal protection rights under the state or federal constitution.

PRISONERS: VENUE FOR PRISONER RIGHTS LAWSUITS

In *Bolton v. Krantz*, 54 Mass. App. Ct. 193 (2000), the Appeals Court holds that, for purposes of deciding venue for a "transitory action" (here, an action against a correctional employee for depriving him of personal property), an inmate of a state prison or house of correction "lives" both in the county where he maintains his domicile and in the county in which he is incarcerated at the time the lawsuit is brought. The venue statute, G.L. c. 223, § 1, refers to the county where the party "lives." An inmate "lives" where he is incarcerated. *Id*. at 198-199. The Court rules, however, that the word "lives" also encompasses a party's domicile – "ordinarily the place where he has his home." A domicile, once acquired, is not lost until a new one is "acquired by a clear and honest purpose to [do so], which is carried into actual execution." The involuntary incarceration of a person in another county, which deprives him of the power to decide where he shall live, does not amount to such an acquisition. *Id*. at 196-197. The inmate can, however, make the place of his incarceration his new domicile by evidencing an intent to do so. *Id.* at 198.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT

In *Commonwealth v. Beland*, 436 Mass. 273, 288-289 (2002), the prosecutor remarked to the jury in his closing, "It is not easy to judge another human being, but you have taken that task upon yourselves. I want you to feel honored to have served as jurors. And I'm sure that you will." The Court views this statement as merely thanking the jurors for their service in the case, rather than improperly suggesting that they judge the defendant based on his character. In *Commonwealth v. Vuthy Seng*, 436 Mass. 537, 555-556 (2002), the prosecutor in closing suggested several times to the jurors that the defense had "insulted" them by asking them to consider certain mental health records of the defendant. These assertions, "while close to the line" between permissible "dramatic description in an argument" and impermissible "argument designed to appeal to the jury's emotions," did not cross it. The Court reads the prosecutor's words as an attempt to communicate that the defendant's insanity defense was illogical.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, UNSUPPORTED BY EVIDENCE

In *Commonwealth v. Purrier*, 54 Mass. App. Ct. 397 (2002), summarized at Crimes: Assault by Means of a Dangerous Weapon: Attempted Battery, Sufficiency of Evidence, the prosecutor argued, contrary to the trial testimony, that the defendant was "waving the knife around," and that he had it in his hand when he followed Williams out of the house and down the street. The Court finds no substantial risk of a miscarriage of justice in these misstatements. There was, according to the Court, ample evidence of an assault before the defendant left the house and the use of the term "waving" was "mere verbal embellishment and likely caused no damage." As support for this holding, the Court points to the fact that the jurors acquitted the defendant of the most serious charge, armed robbery of the wallet, and that during deliberations they asked three questions seeking clarification of the meaning of assault, thus "demonstrat[ing] that they were determined to do their job in a conscientious manner uninfluenced by any hyperbole from the prosecutor." (One may reasonably question, however, how the Court knows that the latter factor does not merely reflect the subtlety of the law of assault or the inadequacy of the judge's original charge. A jury may be conscientious in its desire to understand and correctly apply the law, but nonetheless influenced by a prosecutor's inaccurate recital of the evidence.)

Similarly, in *Commonwealth v. Maynard* 436 Mass. 558, 569-571 (2002), summarized at Murder: Sufficiency of Evidence, the Court finds no basis for reversal in the prosecutor's misstatement of a portion of the evidence. Defense counsel's failure to object to the misstatement not only dictates review limited to whether the error created a substantial likelihood of a miscarriage of justice; it is also interpreted by the Court as a sign that trial counsel did not see the error as any big deal, and therefore it probably was not. The Court also relies on the judge's boilerplate instruction that closing arguments are not evidence as reducing the risk of prejudice from the error.

PRACTICE TIP: Stay awake during the prosecutor's closing argument! If the evidence is misstated, object! When you object, demand that the judge correct, or draw the jurors' attention to, the specific misstatement, rather than simply instructing them generally that closing arguments are not evidence or that it is their memory of the evidence that controls. As legal support for your entitlement to a specific curative instruction, cite *Commonwealth v. Kelly*, 417 Mass. 266, 271 (1994) (conviction overturned where "[t]he judge was asked to give particularized instructions to neutralize the errors in the prosecutor's argument and eventually declined, choosing to rest on standard instructions that did not touch on the specific improper arguments that had been made by the prosecutor"); *Commonwealth v. Kozec*, 399 Mass. 514, 518 (1987) ("On numerous occasions, the impact of an improper final argument has been mitigated by the judge's forceful instructions to the jury that the argument was inappropriate and should be disregarded."); *Commonwealth v. McLeod*, 30 Mass. App. Ct. 536, 540-541 (1991) (boilerplate instructions to the jurors to base their verdict on the evidence, not on sympathy, pity, bias, or prejudice, and that the opening statements and closing arguments of counsel are not evidence were "entirely bland" and did not cure the prosecutor's improper argument. The judge should have told the jury "(1) that it was not a "tragedy" that the victim had had to testify before them, (2) that they did not have the power to "rectify" the purported "tragedy," (3) that the offending argument to that effect was to be struck from their consideration, [and] (4) that the prosecutor had engaged in misconduct in making that argument to them."); *Commonwealth v. Ward*, 28 Mass. App. Ct. 292, 296 (1990) (similar boilerplate instructions "were insufficiently directed against the improper comments of the prosecutor and were unlikely to counteract their poisonous effect").

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, OPENING STATEMENT

In *Commonwealth v. Williams*, 53 Mass. App. Ct. 719, 723-724 (2002), summarized at Defenses: Self-Defense, Entitlement to Instruction, the prosecutor called as a witness the defendant's girlfriend – the alleged victim of a domestic assault by him – with some misgiving, apparently anticipating that she would stick up for the defendant. In her opening, the prosecutor warned the jury that the girlfriend might retract some of her accusations against the defendant because "she had a vested interest in protecting her relationship with [him], the father of her child." The defendant argued on appeal that "denigrating the credibility of a prosecutor's own witness who might testify favorably for the defense during an opening statement should be considered by this [c]ourt to be beyond the bounds of proper advocacy." The Court held to the contrary: "A prosecutor is free to articulate in her opening statement a particular underlying motive which is expected to be proved in the case-in-chief as long as that expectancy is reasonable and grounded in good faith." *Id*. at 723, quoting *Commonwealth v. Snow*, 34 Mass. App. Ct. 27, 34 (1993).

In her opening, the prosecutor stated that the defendant kicked his girlfriend "while she was on the ground, several times, in her eight-month pregnant belly." In her closing, the prosecutor referred several times to kicks to "the belly," although the girlfriend only testified that she was kicked in her "side." The prosecutor's comments were "clearly an attempt to garner sympathy for [the girlfriend]" and "quite close to the line of impropriety." 53 Mass. App. Ct. at 724. The

defendant obtained no relief, however, because these remarks did not "go to the heart" of the case, which was self-defense, and the jurors were obviously not swayed by the appeal for sympathy since they acquitted the defendant of the dangerous weapon (shod foot) aspect of the assault and battery charge. Interestingly, when defense counsel in his closing argument deviated somewhat from the evidence and again when he started to argue that the arresting officer had used excessive force, the trial judge interrupted sua sponte and stopped the offending argument. The judge's action was, according to the Appeals Court, appropriate, and it did not "cross the line separating judicial guidance from judicial bias." *Id*. at 726, quoting *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254 (1991).

SEARCH AND SEIZURE: ARREST: PROBABLE CAUSE, BASED ON OUT-OF-DATE REGISTRY OF MOTOR VEHICLES RECORDS

Following a traffic stop of a car driven by the defendant, a Barnstable police officer learned through a computer check of Registry of Motor Vehicle records that the defendant's license was suspended. Following the defendant's arrest, an inventory search of the car's trunk revealed a rifle for which the defendant had no F.I.D. card. Charged with possession of a firearm, he moved to suppress the fruits of the arrest, including the shotgun and an inculpatory statement he later made to the police. He argued that the Registry records were incorrect and that his license had been reinstated more than three years before. *Commonwealth v. Wilkerson,* 436 Mass. 137 (2002). The defendant's argument under the federal constitution was foreclosed by *Arizona v. Evans*, 514 U.S. 1 (1995), which held that the exclusionary rule does not apply to arrests caused by clerical errors by non-police employees. The Supreme Judicial Court reaches the same result under article 14 of the Declaration of Rights. The information from the Registry gave the officer probable cause to arrest the defendant, notwithstanding that the information later turned out to be incorrect. Probable cause is determined as of the time of the arrest, not in light of later revelations. The Appeals Court has held under the federal constitution that, when the clerical mistake leading to an erroneous arrest is made by the police, the burden rests on the prosecution to show that the police were not at fault in failing to update their records or provide correct information. See *Commonwealth v. Hecox*, 35 Mass. App. Ct. 277 (1993); *Commonwealth v. Censullo*, 40 Mass. App. Ct. 65, 69 (1996). The Supreme Judicial Court finds it unnecessary to consider the correctness of that holding, since here the mistake was made by the Registry, an agency independent of the Barnstable police department. Suppression would serve no interest in deterring police misconduct, since there was no police misconduct in properly relying on information supplied by another state agency as establishing probable cause to arrest the defendant.

SEARCH AND SEIZURE: ARREST: PROBABLE CAUSE, DRIVER OF CAR IN DRUG DEAL AS JOINT VENTURER

Acting on detailed predictive information from a reliable informant, police set up surveillance of Interstate 495, anticipating a drug delivery in the northbound Chelmsford rest area. At about the expected time, a car which essentially matched the description given by the informant stopped in the southbound rest area. The defendant was the driver of the car. A codefendant (who matched a description given by the informant) left the car and, dodging the traffic, crossed the highway to the northbound rest area. He surveyed that rest area and then returned through the traffic to the southbound area, where he spoke through the car window to the defendant. The police moved in, searched the car, and found cocaine inside. They arrested the defendant, as well as the codefendant. Although it does not appear that the informant mentioned the driver of the car, the Appeals Court holds that there was probable cause to arrest the defendant, who later made admissions to the police. *Commonwealth v. Rosario***,** 54 Mass. App. Ct. 914 (2002). The police could reasonably conclude from the defendant's actions in driving the car, parking it in the rest area, and then waiting while the codefendant crossed the interstate on foot and returned that his involvement was more than "mere presence," and that he was a joint venturer in the planned drug delivery.

SEARCH AND SEIZURE: COMMUNITY CARETAKING FUNCTION

At 11:30 p.m., a state trooper came across a car parked in the breakdown lane of a rural highway with its right blinker flashing. The trooper pulled in behind the car, activated his blue lights, and approached to see if the occupant needed assistance. The defendant was asleep in the driver's seat. The trooper awakened him with a knock on the driver's side window and asked what he was doing there. The defendant replied, "Nothing." The trooper's request for a license and registration led to the discovery that the defendant's license had been revoked. The defendant was arrested and a later inventory search of his person turned up illegal narcotics. The denial of his motion to suppress the fruits of the trooper's actions was affirmed by the Appeals Court, *Commonwealth v. Evans*, 50 Mass. App. Ct. 846 (2001), and the Supreme Judicial Court granted further appellate review. The Supreme Judicial Court finds that the trooper's actions were an appropriate exercise of his community caretaking function. *Commonwealth v. Evans*, 436 Mass. 369 (2002). According to the Court, activities such as checking on the wellbeing of motorists are totally divorced from the detection and investigation of crimes, and they do not require judicial justification. The trooper's activation of the blue lights on his

cruiser (presumably as a safety precaution) did not change his actions into a "seizure" of the defendant. *Id*. at 373-374. Nor was his request for the defendant's license and registration improper. It was a reasonable means for the trooper to learn who he was dealing with in order to make out the required report or in case of a later complaint. The minimal intrusion involved in the request was not a seizure of the defendant's person. *Id*. at 374-376.

SEARCH AND SEIZURE: INVENTORY SEARCH: RECORDING ACCOUNT NUMBER ON BANK CARD

In *Commonwealth v. Vuthy Seng*, 436 Mass. 537, 548-555 (2002), the police conducted an inventory search of the defendant following his arrest for first degree murder. During the search, they found a bank card – *not* an ATM or credit card – bearing the bank name on the front and account numbers on the back. They recorded the account numbers and ultimately used those numbers to obtain from the bank evidence presented at trial. The Supreme Judicial Court holds that this evidence should be suppressed because the police exceeded the permissible scope of an inventory search. Such a search cannot be used for investigative purposes. While the police did not have to close their eyes to the fact that the card was a bank card, they had no legitimate inventory purpose in examining the account numbers closely enough to record them. The Court leaves open the question whether there might be a legitimate inventory purpose for recording account numbers that appear on an ATM, credit, or other card which could be used to obtain items of value. *Id*. at 552 & 554 n.14.

SEARCH AND SEIZURE: KNOCK AND ANNOUNCE RULE

In *Commonwealth v. Moore*, 54 Mass. App. Ct. 334 (2002), summarized at Search and Seizure: Warrantless Search: Exigent Circumstances, Search of Apartment from Which Shots Fired, the defendants argued that the fact that the police knocked before entering the apartment unit from which gunshots had been fired demonstrated that they did not feel the situation to be urgent. The Court's remarks in rejecting this contention and upholding the officers' "adher[ence] to the common-law requirement of knocking and announcing," may be helpful to defendants when the prosecution attempts to justify a no-knock entry as necessary for police safety: "Considering that the officers had probable cause to believe that someone inside the apartment had been firing a gun, this course of action likely diminished the chance of injury." *Id*. at 338 n.5.

SEARCH AND SEIZURE: PROTECTIVE FRISK

Two police officers in a marked cruiser were on routine patrol in a "high-crime area"at 11:05 p.m. Seeing the cruiser, the defendant and two other men "did a U-turn" and walked briskly away. The officers followed and pulled over their cruiser a few feet from the defendant, who then made "a quick movement with his left hand to his waist area." Believing that the defendant was reaching for a weapon, one of the officers approached him and patted him down, discovering a sawed-off rifle in the process. The defendant's motion to suppress the fruits of the protective frisk was denied. *Commonwealth v. Fisher*, 54 Mass. App. Ct. 41 (2002). While none of the circumstances was enough standing alone to justify the police actions, the Appeals Court concludes that "the aggregated circumstances – the evasive reaction of the defendant and his cohorts to the presence of the police, the fact that the episode took place at a late hour in a high crime area which was known for the presence of illegal firearms, and the defendant's quick motion to his waist – gave [the officer] a reasonable basis to conduct a protective frisk." *Id*. at 44. The Court distinguishes *Commonwealth v. Barros*, 435 Mass. 171, 172-178 (2001), where the Supreme Judicial Court rejected a prosecutorial attempt to justify the stop and frisk of the defendant on the basis of an anonymous tip that a man similar to him had been seen showing a handgun to others. The *Barros* decision relies on the absence of reasonable suspicion of criminal misconduct to justify the stop, while the frisk here was justified as necessary for the officer's own protection. *Id*. at 46-47. (It is ironic that the officers here had even less reason to suspect the defendant of a crime than did the officers in *Barros*. The *Fisher* opinion never really says what crime was suspected. Indeed, since the officers had done no more than pull up next to the defendant in their car when he made the "quick movement" toward his waist, this may be a case in which no stop ever occurred and the police were entitled to conduct a protective frisk as preliminary to simply talking to the defendant, rather than stopping him. See *Commonwealth v. Pierre P.*, 53 Mass. App. Ct. 215, 217 (2001).

SEARCH AND SEIZURE: REASONABLE SUSPICION, FRUIT OF POISONOUS TREE, INDEPENDENT INTERVENING ACTS

At about 10:00 p.m., two Springfield police officers responded to a call from a woman who reported that a black male had knocked on her back door but ran when she went to the door and "confronted" him. Patrolling the area (a predominantly African-American residential neighborhood) a few minutes later, the officers saw the defendant, a black male, walking with a bulky object under his coat. The officers pulled up beside him in their cruiser and asked to speak with him. He ignored them and began walking faster. One of the officers got out of the cruiser and followed him, telling him to stop. The defendant still ignored him. Then, when the officer was within two feet of him, the defendant turned, pulled a VCR from under his coat, threw it at the officer, striking him in the leg, and ran. Apprehended and charged with assault and

battery by means of a dangerous weapon, resisting arrest, breaking and entering, and larceny, the defendant moved to suppress the VCR as the fruit of an illegal stop. The motion judge suppressed the VCR and the prosecution obtained leave for an interlocutory appeal. *Commonwealth v. Mock*, 54 Mass. App. Ct. 276 (2002). The Appeals Court agrees with the motion judge that the officer's emergence from his cruiser and order to the defendant to stop amounted to a "seizure" requiring reasonable suspicion, and that the circumstances as found by the judge did not rise to that level. Essentially, the Court holds that the fact that the defendant was walking in a residential neighborhood shortly after 10:00 p.m. with a bulky object under his coat and increased his pace when hailed by the police did not justify reasonable suspicion. In reaching this conclusion, the Court notes that it was not even clear that a crime was committed at the home to which the police first responded *Id*. at 282-283. The Court agrees with the defendant that his disposal of the VCR in response to the illegal stop did not constitute abandonment of it. Nonetheless, the Court nonetheless holds that the VCR should not have been suppressed. Instead, the Court concludes (apparently sua sponte and without the benefit of briefing or argument) that the defendant's "independent and intervening action of attacking" the officer by throwing the VCR at him" broke the chain of causation and dissipated the taint of the prior illegality." *Id*. at 284, quoting *Commonwealth v. King*, 389 Mass. 233, 245 (1983). In the *King* case, a co-defendant had begun shooting at the police following the illegal detention and (arguably unlike in *Mock*) all of the evidence for which suppression was sought was recovered during a search incident to arrest and a vehicle inventory search after the defendant and co-defendant were arrested for the shooting. Because the evidence did not flow from the "exploitation of the primary illegality," suppression was not appropriate. According to the Court in *Mock*, if the defendant had merely dropped the VCR, suppression would have been required. However, because he threw it at the officer's leg suppression was inappropriate. "[E]xtending the fruits doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct." 54 Mass. App. Ct. at 284, quoting *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983).

SEARCH AND SEIZURE: REASONABLE SUSPICION, TRAFFIC STOP FOR OPERATING AFTER LICENSE REVOCATION

Having learned two months before that the defendant's license to drive had been revoked and that the revocation was not scheduled to expire for almost three years, a Carver police officer stopped the defendant when he saw him driving his distinctive truck on Route 44. The defendant was charged and ultimately convicted of operating a motor vehicle after license revocation for driving under the influence. *Commonwealth v. Deramo*, 436 Mass. 40 (2002). On appeal, he argued that the officer lacked reasonable suspicion to justify the traffic stop and that the evidence that flowed from the stop should have been suppressed. The Supreme Judicial Court holds otherwise. Even ignoring the testimony of the officer that he had recognized the defendant as the driver before he stopped the car, the officer could reasonably conclude, in the absence of evidence to the contrary, that the truck was likely being driven by its owner, the defendant. *Id*. at 43-44. It was also unnecessary for the officer to obtain an updated license check on the defendant before stopping him. While it was conceivable that the defendant's license could have been reinstated, "[t]he standard of reasonable suspicion does not require that an officer exclude all possible innocent explanations of the facts and circumstances." *Id*. at 44.

SEARCH AND SEIZURE: SEARCH INCIDENT TO ARREST, TO IDENTIFY ARRESTEE; FRUIT OF POISONOUS TREE

Spying the defendant drinking a bottle of beer in a Brockton parking lot, three state troopers approached him. When he gave questionable information as to his identity, he was placed under arrest for drinking in public. Preliminary to placing him in their cruiser, one of the troopers pat frisked the defendant and discovered a set of car keys. Although the defendant said that he walked there, the troopers tried the keys to see if they fit any of the vehicles in the immediate vicinity. The keys opened the trunk of a Chevrolet located about fifteen feet from where the defendant was first seen. He told the police that the car belonged to his girlfriend. Shining a flashlight through the front windshield of the car, the troopers saw a plastic bag containing cocaine. The defendant was subsequently charged in district court with possession of cocaine with intent to distribute it and a school zone violation. His motion to suppress the keys and the cocaine was denied, but his application for leave to pursue an interlocutory appeal was granted. The Appeals Court reverses. *Commonwealth v. Blevines*, 54 Mass. App. Ct. 89 (2002). The prosecution tried on appeal to defend the search as a lawful one incident to the defendant's arrest. Under G.L. c. 276, § 1, such a search is limited to "fruits, instrumentalities, contraband, and other evidence of the crime for which the arrest has been made," of the crime for which the defendant is arrested, as well as any weapons that the defendant might use to resist arrest or to escape. The keys were certainly not "fruits" or "instrumentalities" of the open container crime for which the defendant was arrested. Nor was there any suggestion at the suppression hearing that the troopers (who outnumbered the defendant and his companion) took the keys to ensure their safety. The motivation of the police and the basis on which the motion judge upheld the search was a perceived need to

establish the defendant's identity. According to the Appeals Court, however, questions concerning an arrestee's identity are to be determined at booking by fingerprinting or questioning or at arraignment, "and not by questionable police actions at the scene of the arrest which trench upon an individual's right to be free from unreasonable and unjustified inquiries and intrusions." *Id*. at 94-95 & n.9, quoting *Commonwealth v. Pacheco*, 51 Mass. App. Ct. 736, 742 (2001). With respect to the cocaine found in the car, the Court is unwilling to uphold its seizure, even though it was in "plain view" once the troopers directed their attention to the car. Instead, the view and the seizure are held to be a fruit of the illegal seizure of the keys because, without that seizure, the police would never have looked inside the car and seen the cocaine. *Id*. at 97-98.

SEARCH AND SEIZURE: WARRANT, PARTICULARITY REQUIREMENT, PLAIN VIEW EXCEPTION; VIDEOTAPING PREMISES; FRUIT OF POISONOUS TREE, INEVITABLE DISCOVERY

The defendants, husband and wife, were suspected of forging invoices at the school where they both worked in order to purchase household items for themselves. The police obtained a warrant to search the defendants' home for, and seize, seventeen specific items. When they executed the warrant, they arranged for the presence of a photographer to videotape and take still photographs of the entire house and its contents. They also seized various items which were not listed in the warrant but were found in plain view during the search. A superior court judge suppressed those items, as well as the videotape and photographs, any testimony by the searching officers about the items depicted in the videotape and photographs, and various items in the videotape and photographs which were later seized pursuant to a second search warrant. The Supreme Judicial Court affirms the suppression, except as to the items found in plain view. *Commonwealth v. Balicki*, 436 Mass. 1 (2002). Backed by the judge's findings of fact, the Court concludes that, because "the officers inspected everything of potential evidentiary value in every room in the home, in essence conducting an inventory search," "the limited search authorized by the warrant was converted into a general search of the home for potential evidence, in violation of the Fourth Amendment and art. 14." *Id*. at 11. The videotape and photographs both "documented the offending nature of the search . . . [and] contributed to its intrusiveness." *Id*. at 11-12. The Court upholds the suppression of the videotape and photographs, as well as all testimony by the searching officers as to any items observed during the search other than items specifically listed in the warrant or seized under the plain view doctrine. The Court also affirms the suppression of various items which were videotaped or photographed during the search and then seized under the later warrant. As to these, the Court upholds the judge's finding that the prosecution failed to establish that they would inevitably have been discovered even without the earlier illegal search. *Id*. at 16. With respect to the plain view issue, the Court rejects the prosecution's suggestion that it should abandon, as the United States Supreme Court did in *Horton v. California*, 496 U.S. 128 (1990), the requirement that the police come across the particular item "inadvertently." The Court considers this requirement necessary to implement the Article 14 demand that the police obtain a warrant when feasible and that the warrant be "accompanied with a special designation of the . . . objects of search . . . or seizure." A discovery of evidence is "inadvertent" for plain view purposes if the "police lack[] probable cause before entering the room to believe the items would be there." 436 Mass. at 8. Here, the motion judge found that the police did not anticipate finding the specific items that they seized in plain view, but that they had reason to expect that some stolen items other than those listed in the warrant would be found in the home. The Supreme Judicial Court concludes that the former finding qualified the discovery of the items as inadvertent, and that the latter "generalized anticipation," which "exists in conjunction with almost every search," did not negate the inadvertence. *Id*. at 14.

PRACTICE TIP: The Court's adherence to the inadvertence requirement under the plain view doctrine as a matter of state constitutional law is yet another reason to always invoke the state constitution, as well as the federal, in a motion to suppress. With respect to videotaping or photographing the execution of a search warrant, the Court leaves open the question whether "the videotaping and photographing of a proper search would be unconstitutional" and whether, if not, prior court authorization would be required. *Id*. at 12 n.13. The Court does say, however, that "the limited photographic preservation of the condition of a search scene (to protect the police from allegations of damage), or the photographic preservation of evidence, in situ, that the police otherwise have the right to seize pursuant to a warrant or any exception thereto . . . is not offensive to the privacy interests protected by art. 14."

SEARCH AND SEIZURE: WARRANTLESS SEARCH: EXIGENT CIRCUMSTANCES, SEARCH OF APARTMENT FROM WHICH SHOTS FIRED

Within minutes after the police received multiple reports of shots fired, officers arriving at the scene spoke with an unidentified man in front of a three-unit apartment who told them, "They have a Tech-Nine up there. They have been shooting out the window of the second floor." The door to the second floor apartment was answered by a man who told the police that he rented the apartment and who allowed them inside. Once inside, the police detected an odor of gunpowder, which was stronger in the back bedroom of the apartment. Proceeding to that bedroom, one of the officers

ordered a man lying on the bed to leave the room. As the officer gave this order, he heard "muffled voices and a thud" behind the open bedroom door. When he ordered whoever had made this sound to leave the room, the two defendants, Moore and Jones, emerged from behind the door. In the meantime, an officer stationed outside the back bedroom window had found two 9 mm. shell casings under the window and, through the window, had seen the defendants standing in front of the bedroom closet. A subsequent search of that closet revealed a .38 caliber gun, discharged shells, and a duffle bag. Inside the bag was a Tech-Nine handgun. Charged with various offenses relating to the possession of the two guns and ammunition, the defendants sought to suppress the fruits of the police search of the apartment. The Appeals Court upholds the denial of their suppression motion. *Commonwealth v. Moore*, 54 Mass. App. Ct. 334 (2002). The Court finds it unnecessary to consider whether the search was justified by the consent, with "apparent authority," of the man who let the police into the apartment. *Id*. at 337-338 n. 4. Instead, it holds that the search was permissible because the police "had probable cause and were faced with exigent circumstances such as danger to their lives, danger to the lives of others, or the destruction of evidence, such that it [was] impracticable to obtain a warrant." *Id*. at 338. The probable cause and exigent circumstances were supplied by the multiple reports of gunshots that prompted the police dispatch, corroborated by the bystander who, minutes later, pointed the police to the apartment from which the shots were fired, and by the smell of gunpowder in the apartment and the shell casings outside. The seizure of the 38 caliber gun in plain view was justified by the report that a gun had been fired from the dwelling – a crime under G.L. c. 269, § 12E. The search of the duffle bag in the bedroom closet was justified even though, by the time of that search, all of those present in the apartment were in the living room under police supervision, since the Tech-Nine was still unaccounted for and the continued search for it was appropriate to ensure the officers "of their safety as they completed the arrests." *Id*. at 340.

SEARCH AND SEIZURE: WIRETAP, BY PRIVATE PARTY, EXCLUSIONARY RULE

Concerned that his teenaged son was having a sexual relationship with the defendant, a father used a recording device to secretly intercept and record four telephone conversations his son had with the defendant on the family phone. After the first two interceptions, the father contacted the police and told them of the secret recordings. The defendant was subsequently charged with rape of a child and indecent assault and battery on a child. His motion to suppress the fruits of the illegal wiretaps was allowed as to the two calls that occurred after the police were contacted, but denied as to the first two. At trial, the recordings of the first two calls were played for the jury. *Commonwealth v. Barboza*, 54 Mass. App. Ct. 99 (2002). On appeal, the defendant argued that his motion to suppress those two calls should have been allowed. The Massachusetts wiretap statute, G.L. c. 272, § 99, is in some ways broader than the federal statute, 18 U.S.C. §§ 2510 et seq. For example, the consent of *both* parties to a telephone call is required to permit the recording of a call under Massachusetts law. However, unlike the federal statute, the Massachusetts statute does not contain language mandating an exclusionary rule for the fruits of an illegal wiretap. Instead, the "Legislature has left it to the courts to decide whether unlawfully intercepted communications must be suppressed." *Id.* at 103, quoting *Commonwealth v. Santoro*, 406 Mass. 421, 423 (1990). The Court here declines, as a matter of state law, to suppress the illegally intercepted conversations because no police or governmental conduct was involved in the interceptions and no deterrent purpose would be served by suppressing the intercepted conversations. The premise of the Court's ruling is that the father's purpose was not to assist law enforcement, but rather to protect his son. With this in mind, the Court "see[s] no reason why the [exclusionary] rule should protect the defendant here from the consequences of the unlawful interception by a private citizen, the father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation by the defendant." *Id*. at 105. Appellate counsel argued in the alternative that trial counsel was ineffective in failing to move for suppression under the federal statute, which does contain an exclusionary rule ("no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter," 18 U.S.C. § 2515). The Court concludes, however, that the father's interceptions did not violate federal law. To the contrary, "all the Federal appellate courts that have considered the proper application of Title III in cases in which custodial parents eavesdrop on or secretly record conversations of their minor children in their own home" have concluded that "no violation of Title III has occurred." 54 Mass. App. Ct. at 105. The federal courts have reached this result either under the Federal statute's provision permitting recording with the consent of only one party to the conversation, with the parent providing the "vicarious" consent of his or her minor child, or under the "extension telephone exception," 18 U.S.C. § 2510(5)(a)(i), which they interpret to permit family members within their own homes to eavesdrop on, and even record, each other. *Id.* at 105-106.

SENTENCING: PERMISSIBLE CONSIDERATIONS

In *Commonwealth v. Mills*, 436 Mass. 387 (2002), the defendant was convicted of various offenses in connection with a scheme in which certain defense attorneys were improperly appointed for indigent criminal defendants. These attorneys would then hire the defendant as an investigator in the cases, and he submitted outrageously inflated invoices for his services to C.P.C.S. Compounding his wrongdoing, the defendant failed while failing to report these earnings to the City

of Boston, which was paying him a disability pension. The sentencing judge delivered a speech in which he harked back to his days as a young Catholic boy going to confession, descried the defendant's failure to admit to his wrongdoing, and mourned the effect of the defendant's actions on public perceptions of state employee corruption. When defense counsel objected to the judge's reliance on the defendant's failure to admit his guilt, the judge "struck" that as a reason, but left the announced sentence unchanged. The Supreme Judicial Court concludes that resentencing is required. In doing so, it lists with citations various inappropriate sentencing considerations, including punishing a defendant for an untried offense, using the sentence to send a personal philosophic message, relying on inaccurate or misleading information, and punishing the defendant for refusing to confess. *Id*. at 400-401. Here, the Court finds "[p]articularly troubling . . . the judge's discussion of his own personal religious experiences, his statement about the impact that his sentencing may have on public perceptions of corruption by Commonwealth employees, and his commentary on the fact that the defendant had not admitted to culpability." *Id*. at 401. The case is remanded for sentencing by a different judge.

SENTENCING: PERMISSIBLE CONSIDERATIONS

The defendant was the absent "mastermind" who provided the actual perpetrators with the guns used in a robbery of drug dealers in which a man was shot and killed. He was tried as an accessory before the fact to armed robbery and murder. He was acquitted of the murder, but convicted of armed robbery. The trial judge imposed a sentence within the sentencing guidelines. In doing so, he remarked that the circumstance "that a death resulted from the armed robbery" was a "significant factor" not "adequately reflected in the guidelines." He said to the defendant, "You were well aware of what was going to happen with these guns, at least to the extent of the robbery, *if not the ultimate death* of [the victim]." On appeal, the defendant argued that the judge had in effect sentenced him for the murder of which the jury acquitted him. *Commonwealth v. Vega*, 54 Mass. App. Ct. 249, 250-251 (2002). According to the Appeals Court, the italicized language indicated otherwise. Nor did the murder acquittal preclude the judge from considering, in assessing the gravity of the robbery, that the defendant had "set in motion a chain of events in which death was a distinct possibility." *Id*. at 251.

SENTENCING: PERMISSIBLE CONSIDERATIONS AT APPELLATE COURT-ORDERED RESENTENCING

The defendant's sentence was vacated by the Appeals Court and his case was remanded for resentencing by a different judge because comments by the original judge suggested that he may have improperly punished the defendant for conduct other than that for which he was convicted. At the resentencing hearing, defense counsel offered mitigating information in the form of various rehabilitative programs and activities in which the defendant had participated while incarcerated during the three years since his original sentencing. The judge expressed the view that she could not consider this information and that she was limited to consideration of the circumstances existing at the time of the original sentencing. *Commonwealth v. White*, 436 Mass. 340 (2002). The Supreme Judicial Court reverses, holding that a judge at resentencing may consider any circumstances, whether favorable or unfavorable to the defendant, which occur up to the time of the resentencing. Because the judge acted under a misconception as to what she could properly consider, the new sentence was vacated and the case remanded for yet another resentencing. The Court denies the defendant's request that this resentencing be by a different judge, since there was no evidence that, aside from her mistake as to the bounds of what she could consider, the judge used inappropriate factors or otherwise conducted herself improperly in imposing the sentence. *Id* at 346.

SEX OFFENDER REGISTRATION

Following his release from a DYS commitment for an adjudication of delinquency for forcible rape of a child, the defendant registered as a sex offender with the Brockton police. However, he was convicted of violating the registration statute because he gave the police his parents' address (which he used as a mailing address), rather than the address where he actually resided. *Commonwealth v. Miranda*, 54 Mass. App. Ct. 502 (2002). The statutory provisions in effect at the time of the defendant's registration were later found unconstitutional in *Doe v. Attorney General*, 430 Mass. 155 (1999) (*Doe* No. 5), because they did not include the right to a prior administrative determination whether the prospective registrant was in fact a likely recidivist subject to registration and public dissemination of his identity. In *Miranda*, the Appeals Court reverses the defendant's conviction because he could not properly have been required to register under the unconstitutional scheme in effect at the time of his allegedly inadequate registration. The Court rejects the prosecution's suggestion that the defendant waived any objection to the unconstitutionality of this scheme by registering without first insisting on a hearing. Conditioning a defendant's right to challenge the constitutionality of a criminal statute on his willingness to risk incarceration by refusing to comply altogether would place "an intolerably heavy burden" on him. 54 Mass. App. Ct. at 507. Nor is the Court convinced by the prosecution's argument that the defendant's crime (rape of a child by force) was so serious that he would inevitably be required to register regardless of the procedure used. The Court acknowledges that the Sex Offender Registration Board could adopt a regulation mandating registration and public dissemination for all persons convicted of such an offense. However, until the board does so, it would be improperly

presumptuous for the Court to anticipate such a regulation. *Id*. Finally, the Court volunteers its opinion that, if the present version of the statute requiring registration, but not permitting dissemination prior to a hearing, had been in effect at the time of the defendant's registration, his conviction would have been allowed to stand. *Id*. at 508.

SEXUAL ASSAULT: DEFENSE: HONEST MISTAKE AS TO CONSENT

See *Commonwealth v. McCrae*, 54 Mass. App. Ct. 27 (2002), summarized at Counsel: Ineffective Assistance: Trial Strategy, Manifestly Unreasonable.

SEXUAL ASSAULT: RAPE, PENETRATION, LESSER INCLUDED OFFENSE

The rape complainant testified to an incident which allegedly occurred when she was twelve years old: The defendant, her mother's uncle, was "licking around [her vagina], licking up like the crack of it . . . . He was licking the lips of it. . . . My labia. I don't know if I was old enough to have a clitoris but he was just licking the whole area." Following his conviction, the defendant filed a new trial motion in which he alleged that his trial counsel was ineffective in failing to consult with him before foregoing a charge on the lesser included offense of indecent assault and battery and pursuing instead an all-or-nothing strategy on the rape charge. The motion judge decided that trial counsel's decision not to request the lesser charge was not a "manifestly unreasonable" tactical judgment, since "such an alternative argument would likely have sapped the force of the defense that no sexual contact occurred and would have been tactically awkward." Nonetheless, the judge granted the new trial motion, holding that the decision whether to request the instruction ultimately rested with the defendant, rather than counsel, and that counsel's failure to consult with the defendant was ineffective assistance. *Commonwealth v. Donlan*, 436 Mass. 329 (2002). The Supreme Judicial Court reverses. The Court briefly reviews the law in other states and the ABA Standards for Criminal Justice on the question of "whether the decision to request an instruction on a lesser included offense is a fundamental decision as to which the defendant has the ultimate authority." *Id*. at 334-335 & nn.5-6. However, the Court avoids the need to answer this question by concluding that the evidence at trial did not justify an instruction on indecent assault and battery. Because the defendant denied the sexual touching altogether, the only evidence about the alleged touching was the above-quoted testimony of the complainant. That testimony was "unequivocal, adequate, and unchallenged,"and, "if credited," established penetration (which consists of touching the vagina, vulva, or labia). It thus "supported only a conviction of rape." *Id*. at 336, 338. The defendant argued that, because the complainant was testifying ten years after the incident, "the jury could have disbelieved her memory with regard to whether penetration occurred, but still have found that an indecent assault and battery took place." The Court rejects this argument. In order to warrant a lesser included offense instruction, there must be some evidence that puts into question the element (here, penetration) differentiating the greater and lesser offenses. "The judge need not reconstruct all possible factual scenarios subsumed in the evidence presented, no matter how unreasonable, and charge the jury accordingly." *Id*. at 337, quoting *Commonwealth v. Egerton,* 396 Mass. 499, 505 (1986).

SEXUAL ASSAULT: UNNATURAL AND LASCIVIOUS ACTS, SODOMY

In *Gay & Lesbian Advocates & Defenders v. Attorney General*, 436 Mass. 132 (2002), the plaintiff organization and various individuals asked the court to declare that the criminal prohibitions against "any unnatural and lascivious act with another person," G.L. c. 272, § 35, and the "abominable and detestable crime against nature," (i.e., sodomy, which encompasses anal penetration and bestiality), G.L. c. 272, § 34, on their face violated the rights to privacy, equality, free expression, and freedom from cruel or unusual punishment guaranteed by the state constitution. The Court refuses to consider this challenge, however, because there was no "actual controversy" between the plaintiffs and the defendant Attorney General and district attorneys. The individual plaintiffs alleged that they engage in acts of the sort covered by the two statutes in places they believe to be private but which they fear might be construed as public (such as parked cars, wooded areas, and secluded beaches). None of them had been or was being prosecuted under either statute. The defendant district attorneys, on the other hand, stipulated that they only prosecute under the statutes if there is probable cause to believe that the acts occurred either in public or without consent. While refusing to consider the alleged facial invalidity of the statutes, the Court does discuss their breadth. It had previously held that "consensual conduct in private between adults" does not qualify as an "unnatural and lascivious act" under § 35. See *Commonwealth v. Ferguson*, 384 Mass. 13, 16 (1981). It now volunteers that the § 34 prohibition of the "crime against nature" does not cover acts committed in private by consenting adults. 436 Mass. at 133-134. Under either statute, the prosecution must prove "that the likelihood of being observed by casual passersby [was] reasonably foreseeable to the defendant, or stated otherwise, that the defendant acted upon an unreasonable belief that his conduct would remain secret." *Id*. at 135, quoting *Ferguson*, 384 Mass. at 16.

SEXUALLY DANGEROUS PERSON: PROBABLE CAUSE HEARING: PROSECUTION'S BURDEN OF PROOF

After nearly sixteen years in state prison for serious sexual offenses committed against young girls, the defendant was within days of being released when the prosecution filed a sexually dangerous person petition against him. Following a temporary commitment, a probable cause hearing was held. The only live witness at the hearing was a qualified examiner who conducted a six-hour review of the documentary record. The presiding judge ruled that the prosecution had not met its burden of showing that the defendant had a mental abnormality or a personality disorder that made him likely to engage in sexual offenses if not confined. The judge dismissed the petition, and the prosecution appealed. *Commonwealth v. Blanchette*, 54 Mass. App. Ct. 165 (2002). The hearing preceded the decision in *Commonwealth v. Bruno*, 432 Mass. 489 (2000), which held that the prosecution's burden at the probable cause hearing is the so-called "directed verdict" standard, rather than the "probable cause to arrest" standard. The Appeals Court takes this occasion to explain the applicable standard, which "requires a two-part inquiry, one part of which is quantitative and the other qualitative." As the Court explains, "[t]he judge must be satisfied, first, that the Commonwealth's admissible evidence, if believed, satisfied all of the elements of proof necessary to prove the Commonwealth's case. Second, she must be satisfied that the evidence on each of the elements is not so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it to conclude that the Commonwealth had met its burden of proof. Th[is] second part of the inquiry, of necessity, involves, inter alia, an assessment of credibility." 54 Mass. App. Ct. at 175. Expert witnesses, no less than lay witnesses, are subject to judicial scrutiny under this second part of the test. *Id*. at 174-174 n. 9. The Court notes that the judge here "was not unwarranted in thinking the evidence before her scant," and that, while the prosecution's expert "touched the formulaic statutory bases in his testimony," the judge was not . . . limited to a 'wooden comparison' of his testimony with the statutory elements." *Id*. at 177. Here, the judge could properly consider the expert's failure to explain his opinion on a reasoned basis, and she was also entitled to question his assessment of the defendant's prison disciplinary record (and therefore his credibility) based on her own experience with such reports. *Id*. at 177-178. Nonetheless, the judgment of dismissal was vacated – primarily because it "appears from the judge's findings that she proceeded on the premise that she was required to determine whether she herself was persuaded by the Commonwealth's evidence, rather than . . . whether that evidence was qualitatively of such a character that no reasonable person could rely on it." *Id. at 179*. The case is remanded to the judge "for an expeditious reevaluation of the evidence and such further proceedings consistent with this opinion as she may deem appropriate." *Id*. In a footnote, the Court refers to the fact that the defendant, who was scheduled to be released from prison, had been held for almost two years pending the prosecution's appeal of the order of dismissal. The Court suggests that, in cases in which a defendant is held beyond his discharge date, the prosecution's right to appeal an adverse decision may be conditioned on its "obtain[ing] necessary transcripts and in all other respects prosecut[ing] the appeal in an expeditious fashion." Furthermore, "pending such appeals (and, in this case, during the pendency of the proceedings on remand), consideration should be given by the trial court judge in appropriate cases to devising and imposing conditions of supervised probation in lieu of detention in the Treatment Center." *Id*. at 167-168 n. 4.

TRIAL PRACTICE: BINDOVER HEARING: PROSECUTION'S BURDEN OF PROOF

Commonwealth v. Blanchette, 54 Mass. App. Ct. 165, 172-174 (2002), summarized at Sexually Dangerous Person: Probable Cause Hearing: Prosecution's Burden of Proof, contains a discussion of the prosecution's burden of proof at a bindover hearing under *Myers v. Commonwealth*, 363 Mass. 843, 850 (1973) – the "functional and procedural analogue [of the SDP probable cause hearing], but not its twin."

TRIAL PRACTICE: COMMENTS BY JUDGE IN JURY-WAIVED TRIAL

In *Commonwealth v. Armstrong*, 54 Mass. App. Ct. 594 (2002), summarized at Crimes: Armed Assault with Intent to Murder: Sufficiency of Evidence, the defense was that the defendant, who according to his expert witnesses suffered a major depression and cocaine psychosis and was suicidal, lacked the specific intent to kill required for an armed assault with intent to murder conviction. In closing argument at the jury-waived trial, defense counsel argued that an inference on this issue adverse to the prosecution should be drawn from the prosecutor's failure to call his own expert who was present in court during the trial. The judge commented that she would draw no such inference, adding, "There was no reason to [call the expert]. He [presumably, the prosecutor] had already reviewed the testimony of [the complainant] and the law enforcement officers on the scene, which clearly established and convinced him that the defendant was focused in his action and on achieving the desired result of killing the target when he fired at the target." On appeal, the defendant argued that this comment suggested that the judge improperly relied on extrajudicial evidence. The Court rejects this argument, finding that the remark was merely an expression of the judge's own opinion, as factfinder, that the prosecution probably decided it did not need its expert to establish the defendant's intent to kill. *Id*. at 597-599. The Court suggests,

however, that "it certainly would have been better for the judge to have phrased her view of the evidence in a different way — specifically, to have avoided any suggestion that she had been influenced by extrajudicial evidence." *Id*. at 598-599.

TRIAL PROCEDURE: DISCHARGE OF DELIBERATING JUROR

During jury deliberations in a first degree murder trial, the son and husband of one of the jurors were arrested due to a domestic altercation. The juror's son was incarcerated at the same jail as the defendant. Although the juror asserted that she could remain impartial and the judge did not find otherwise, the judge's allowance "in an abundance of caution"of the prosecution's request to discharge the juror was proper. *Commonwealth v. Garrey*, 436 Mass. 422, 430-431 (2002). In particular, the Court notes that "a palpable conflict existed in that the juror's son was arrested, held in jail, and awaiting prosecution by the same district attorney's office prosecuting the defendant." *Id*. at 431 n. 5. Nor did the defendant demonstrate any prejudice from the discharge of the juror.

TRIAL PROCEDURE: QUESTIONING OF WITNESS BY JUDGE

On the morning of the defendant's trial for, among other offenses, kidnapping and raping five prostitutes, each of the alleged victims, including Sarah, viewed a lineup that included the defendant. Sarah did not identify the defendant. Instead, she picked out another man in the lineup as looking familiar. When she took the stand at trial, the prosecutor showed her a picture of the lineup and asked her who in the picture reminded her most of her assailant. Sarah sought clarification of the question, asking the prosecutor, "Right now, or when I was looking [at the actual lineup]?" The prosecutor clarified that she was asking about the actual lineup. However, after defense counsel finished his cross-examination of Sarah, the judge asked her several identification-related questions, including, "Do you see the person in court here today who [assaulted you]?" Sarah responded, "Now that I see the person in front of me, I can recognize him." She proceeded to identify the defendant, who was sitting at counsel table next to his attorney. On appeal, the defendant argued that the judge's questioning went beyond the bounds of proper judicial questioning and led to a highly suggestive and, therefore, unreliable in-court identification. *Commonwealth v. Gomes*, 54 Mass. App. Ct. 1 (2002). While "urg[ing] trial judges to exercise restraint in questioning witnesses," *id*. at 6, the Appeals Court finds no error. A judge may "ask[] questions to clarify a point, to prevent perjury, or to develop trustworthy testimony." *Id*. at 5, quoting *Commonwealth v. Fitzgerald*, 380 Mass. 840, 847 (1980). The Court holds that Sarah's question to the prosecutor ("Right now, or when I was looking [at the actual lineup]?") "was sufficient to alert the judge of the need to clarify [her] identification testimony." 54 Mass. App. Ct. at 5. Although the judge's questions led to a suggestive one-on-one identification of the defendant, this suggestiveness "went to the weight, not the admissibility," of the identification, and the jurors were able to assess for themselves the trustworthiness of the identification. Defense counsel thoroughly cross-examined the witness on this point, and the judge gave the standard jury instruction about identification, including the caveat that "an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness." In any event, the matter did not give rise to a substantial risk of a miscarriage of justice because other evidence on the identification issue was overwhelming.

TRIAL PROCEDURE: UNRECORDED LOBBY CONFERENCES

In *Commonwealth v. Serino*, 436 Mass. 408, 412 n.2 (2002), discussed at Admissions and Confessions: Voluntariness: Duty of Trial Judge to Conduct Voir Dire Sua Sponte Before Admitting Statement, Waiver by Defendant, the Supreme Judicial Court repeats its disapproval of unrecorded lobby conferences.

WITNESS: OATH, REFUSAL TO TAKE

In *Adoption of Fran*, 54 Mass. App. Ct. 455, 465-468 (2002), discussed at Evidence: Profile Testimony, the children's father was about to testify. However, when the judge asked the clerk to swear him in, the father told the judge, "I cannot swear in, Your Honor. I will not take an oath." Rather than explaining to the father his option under G.L. c. 233, § 18, to "affirm" instead of taking the traditional oath, the judge told him that, by giving his testimony without an oath, he was "telling [the judge] that [he was] not necessarily telling [him] the truth," and that "that's the way [the judge was] taking it." As a result, the father told the judge that he had nothing to say. While it appears that the Appeals Court would have found this reversible error in other circumstances, it does not do so here for two reasons: First, the father, who appeared pro se at trial, said what he had to say elsewhere during the trial; and second, the father repeatedly "demonstrated that his value system, his beliefs, and his actions were substantially dictated by considerations divorced from the laws, physical and legal, governing the rest of society," thus giving the judge "good reason to discount anything the father had to say unless the father affirmatively recognized that his testimony was subject to the laws generally applicable in the courts throughout the Commonwealth." *Id*. at 468.